85-1442

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

EDNA JOHNSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in this class action brought under 42 U.S.C. 405(g) to challenge regulations promulgated by the Secretary of Health and Human Services under the Social Security disability programs, the district court properly exercised jurisdiction over the claims of class members who did not exhaust their administrative remedies or obtain a final decision of the Secretary within 60 days of the filing of the complaint.

2. Whether the court of appeals correctly invalidated regulations issued by the Secretary, 20 C.F.R. 404.1520(c) and 416.920(c), which provide that a person seeking Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment that significantly limits his ability to do basic work activities.

PARTIES TO THE PROCEEDING

The petitioner is the Secretary of Health and Human Services. The named respondents, Edna Johnson and James Montgomery, represent the following class certified by the district court (App., *infra*, 41a):

> All persons in Illinois who are filing or have filed applications for disability benefits under Title II and/or Title XVI of the Social Security Act, and whose benefits are being or have been denied pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1522, 416.920(c) and .922 (1982); and the Social Security Rulings cum. ed. 82-55 (1982); and all recipients of such benefits who are making or have made claims for continued benefits (through participation in a Continuing Disability Interview), and whose benefits are being or have been terminated pursuant to the same policies.

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In the Supreme Court of the United States

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No.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

EDNA JOHNSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 769 F.2d 1202. The order denying the Secretary's petition for rehearing with suggestion for rehearing en banc and the opinion dissenting from that order (App., *infra*, 28a-36a) are reported at 776 F.2d 166. The December 7, 1983 order of the district court certifying the plaintiff class (App.,

infra, 39a-49a) is reported at 100 F.R.D. 70, and the September 19, 1984 order of the district court granting the plaintiffs' motion for summary judgment (App., *infra*, 50a-64a) is reported at 593 F. Supp. 375. The December 17, 1984 order of the district court denying the Secretary's motion to alter or amend the judgment (App., *infra*, 65a-76a); the March 15, 1985 order of the district court prescribing procedures and time limits for reopening claims, denying the Secretary's motion for a stay pending appeal, and denying plaintiffs' motion for contempt (App., *infra*, 78a-95a); and the March 1985 supplemental order of the district court (App., *infra*, 96a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1985 (App., *infra*, 37a-38a), and the petition for rehearing was denied on October 30, 1985 (App., *infra*, 28a-36a). By order dated January 22, 1986, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 223(d)(1)(A) and (2)(A), 1614(a)(3)(A) and (B) of the Social Security Act, 42 U.S.C. 423(d)(1)(A) and (2)(A), 1382c(a)(3)(A) and (B); Sections 223(d)(2)(C) and 1614(a)(3)(G) of the Social Security Act, as added by Section 4 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800-1801 (to be

codified at 42 U.S.C. 423(d)(2)(C), 1382c(a)(3)(G)); and 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 are reproduced at App., *infra*, 99a-106a.

STATEMENT

This is a class action brought on behalf of Illinois residents to challenge two regulations that are integral parts of the five-step sequential evaluation process established by the Secretary of Health and Human Services to determine whether a person seeking disability benefits under the Social Security Act is disabled. The regulations, 20 C.F.R. 404.1520(c) and 416.920(c), provide that if the claimant does not have a medically "severe" impairment—defined to mean an impairment that significantly limits a person's ability to do basic work activities that are necessary for most jobs—the claimant will be found not to be disabled.

1. Title II of the Social Security Act provides, inter alia, for the payment of insurance benefits to a person who is "under a disability." 42 U.S.C. 423(a)(1)(D). Disability benefits also are provided under the Supplemental Security Income program established by Title XVI of the Act. 42 U.S.C. 1382(a). The term "disability" is defined under both programs to mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" (42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A)). The Act further provides that an individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, consider-

ing his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. 423 (d)(2)(A), 1382c(a)(3)(B)).

To implement these statutory definitions, the Secretary has established a five-step "sequential evaluation" process to be followed in determining whether a claimant is disabled. 20 C.F.R. 404.1520, 416.920. At step 1, the decision-maker (the state agency, administrative law judge (ALJ), or Appeals Council) determines whether the individual is engaged in work that constitutes substantial gainful activity. If so, he is found not to be disabled. 20 C.F.R. 404.1520(b), 416.920(b). If the claimant is not engaged in substantial gainful activity, the decision-maker must determine at step 2 whether he has a medically "severe" impairment. 20 C.F.R. 404. 1520(c), 416.920(c). An impairment is not "severe" if it does not "significantly limit" the claimant's physical or mental ability to do "basic work activities" (20 C.F.R. 404.1521(a), 416.921(a)), which include walking, standing, lifting, etc.; capacities for seeing, hearing and speaking; understanding and carrying out simple instructions; using judgment; responding appropriately to supervision and co-workers; and dealing with changes in a routine work setting. 20 C.F.R. 404.1521(b), 416.921(b). If the claimant's impairment does not significantly limit his ability to do these basic work activities, he is found not to be disabled without specific consideration of his age, education, and work experience. 20 C.F.R. 404.1520(c), 416.920(c).

If the claimant does have a "severe" impairment, the decision-maker then must determine at step 3 whether the impairment is equal in severity to one of the listed impairments that are deemed to be disabling

on medical grounds alone. 20 C.F.R. 404.1520(d), 416.920(d). If the impairment is not so severe as to meet the listings, the claimant will be found not to be disabled at step 4 if he is still able to do his past work. 20 C.F.R. 404.1520(e), 416.920(e). But if the claimant cannot do his past work, the decision-maker must determine at step 5 whether, in light of the claimant's age, education, and work experience, he can perform other work that exists in the national economy. 20 C.F.R. 404.1520(f), 416.920(f).

2. a. This class action was brought in the United States District Court for the Northern District of Illinois to challenge the severity step of the sequential evaluation process (App., *infra*, 39a-41a). One of the two named plaintiffs, Edna Johnson, applied for SSI disability benefits on March 24, 1982. After the state agency determined that she was not disabled, she requested an ALJ hearing. The ALJ denied her claim on the ground that each of her impairments was not severe, and the Appeals Council affirmed. The other named plaintiff, James Montgomery, had been awarded disability benefits in 1976 on the basis of diabetes and heart disease. On January 8, 1982, Montgomery was notified that he was no longer considered disabled and that his benefits would be terminated effective October 1981. Montgomery appealed, and the ALJ concluded that he still was disabled. However, the Appeals Council granted review on its own motion and concluded that neither his heart disease nor his diabetes was a severe impairment. The Appeals Council therefore held that Montgomery was not disabled. App., *infra*, 5a-6a, 54a-55a.

After their claims were denied by the Appeals Council, Johnson and Montgomery sought judicial review pursuant to 42 U.S.C. 405(g). An amended

class complaint was filed on August 11, 1983. The plaintiffs challenged the regulations requiring a claimant to demonstrate a "severe" impairment (20 C.F.R. 404.1520(c), 416.920(c)), as well as companion regulations that then provided that the combined effect of unrelated impairments would not be considered unless each impairment, considered separately, was severe (20 C.F.R. 404.1522, 416.922). On December 7, 1983, the district court certified a class consisting of (i) all persons in Illinois "who are filing or have filed applications" for Title II or SSI disability benefits and whose claims are being or have been denied pursuant to the challenged severity policies, and (ii) all recipients of Title II or SSI disability benefits in Illinois "who are making or have made claims for continued benefits * * * and whose benefits are being or have been terminated pursuant to the same policies" (App., *infra*, 41a). Although the named plaintiffs had obtained a decision from the Appeals Council before seeking judicial review pursuant to 42 U.S.C. 405(g), the district court held that the class could include unnamed class members who had not exhausted their administrative remedies (App., *infra*, 42a-47a).

b. In an opinion dated September 19, 1984, the district court held that the severity step of the sequential evaluation process is invalid to the extent that it permits the denial of a claim where the claimant is unable to perform his own past work. The court relied on judicial decisions stating that a claimant establishes a prima facie case of disability if he shows that he cannot perform his past work, and that the burden then shifts to the Secretary to establish that there are other jobs in the national economy that the claimant can do. In the court's view, the severity

regulations impermissibly increase the showing the claimant must make to establish a prima facie case of disability because they substitute an inability to perform "basic work activities" for an inability to perform past work. App., *infra*, 58a-61a. The district court also held that the Secretary must consider the combined effect of unrelated impairments, even if those impairments, considered separately, are not severe. *Id.* at 61a-62a.

As relief, the district court enjoined the Secretary from enforcing the relevant regulations insofar as they do not recognize a prima facie case of disability where the claimant is unable to do his past work and do not consider the combined effect of nonsevere impairments. The court also ordered the Secretary to "hold new disability hearings for class members"; to reinstate benefits pending the hearing determinations to those class members whose benefits were terminated; and to grant retroactive benefits to any class members who are found after a new hearing to be disabled. Finally, the court remanded the claims of Johnson and Montgomery to the Secretary for redetermination without application of the challenged policies. App., *infra*, 63a-64a.

c. In a December 17, 1984 order denying the Secretary's motion to alter or amend the judgment (App., *infra*, 65a-76a), the district court rejected the Secretary's contention that it had improperly awarded relief to persons who had not sought judicial review within 60 days of the final decision on their claims, as required by 42 U.S.C. 405(g). The court held that compliance with the 60-day filing requirement is not a jurisdictional prerequisite and that the Secretary had waived the 60-day issue under Fed. R. Civ. P. 8(c) and 12(h)(1) because it was not "sufficiently raise[d]" in the answer to the amended complaint or

the memorandum on class certification. App., *infra*, 69a.

The district court also rejected the Secretary's contention that the validity of the severity step of the sequential evaluation process was confirmed by the intervening enactment of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* Section 4 of that Act (98 Stat. 1800) requires the Secretary, effective December 1, 1984, to consider the combined effect of impairments in determining whether the claimant's impairments are severe.[1] The district court acknowledged that Congress approved the sequential evaluation process and the severity step when it passed the 1984 Act. But in the court's view, Congress's action did not undermine its September 19 holding that the severity regulations' focus on the claimant's ability to do "basic work activities," rather than his ability to do his prior work, was inconsistent with the Social Security Act. App., *infra*, 73a-74a.

d. On March 25, 1985, the district court ordered the Secretary to provide for the reopening and re-

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[1] Subsections (a) and (b) of Section 4 of the 1984 Act (98 Stat. 1800) add a new paragraph (C) to Section 223(d)(2) of the Social Security Act (to be codified at 42 U.S.C. 423(d)(2)(C)) and a new paragraph (G) to Section 1614(a)(3) of that Act (to be codified at 42 U.S.C. 1382c(a)(3)(G)). Each paragraph requires the Secretary, when considering whether a claimant's impairment or impairments "are of a sufficient medical severity that [they] could be the basis of eligibility," to "consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity." Subsection (c) (98 Stat. 1801) of Section 4 provides that these amendments "shall apply with respect to determinations made on or after the first day of the first month beginning after 30 days after the date of the enactment of this Act."

determination of the claims of all Illinois residents whose claims for disability benefits were filed or pending at any time on or after February 26, 1979—more than four years before this suit was filed. The March 25 order prescribed detailed procedures and time limits for implementing that relief. *Id.* at 90a-95a.[2]

3. a. The court of appeals affirmed (App., *infra*, 1a-27a). The court of appeals first rejected the Secretary's argument that the district court granted relief to class members over whom it had no jurisdiction under 42 U.S.C. 405(g). In the court's view, respondents' challenge to the severity regulations was "sufficiently collateral" to the class members' claims for benefits to justify a judicial "waiver" of the exhaustion requirement under 42 U.S.C. 405(g), because more than " 'ministerial details' " would remain to be adjudicated on the claims of the individual class members if the severity regulations were invalidated. App., *infra*, 11a, quoting *Heckler* v. *Ringer*, No. 82-1774 (May 14, 1984), slip op. 11. The court further believed that the class members' failure to exhaust their administrative remedies could be excused on the basis of "futility," because the challenged severity policies were embodied in published regulations that were not likely to be altered in the course of administrative appeals on the claims of individual class members. App., *infra*, 11a. The court of appeals similarly agreed with the district court that the 60-day filing requirement in 42 U.S.C. 405(g) is not jurisdictional and that the Secretary did not sufficiently raise the class members' failure to comply

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[2] The district court also denied the Secretary's motion for a stay pending appeal (App., *infra*, 78a-89a), but the court of appeals thereafter granted a stay (*id.* at 7a).

with that requirement to preserve it as a defense. App., *infra*, 11a-13a.

On the merits, the court of appeals held that the Title II and SSI severity regulations are invalid to the extent they permit the Secretary to deny benefits to a claimant who has established that he is unable to perform his own past work. App., *infra*, 13a-18a, 22a, 27a. Like the district court, the court of appeals believed that the disability determination must be a two-step process, "with the first step placing the burden on the claimant to demonstrate inability to perform past work," and the burden then shifting to the Secretary to show that there are other jobs in the national economy that the claimant is able to do (*id.* at 15a-16a). The court of appeals also rejected the Secretary's contention that Congress endorsed the severity step of the sequential evaluation process when it enacted Section 4 of the Social Security Disability Benefits Reform Act of 1984, which requires the Secretary to consider the combined effect of nonsevere impairments when deciding whether the claimant's impairments are severe. See page 8 & note 1, *supra*. The court relied on statements in the House Report expressing concern that the criteria for determining whether an impairment is nonsevere were too stringent and observing that the Secretary intended to reevaluate those criteria. App., *infra*, 18a-20a, quoting H.R. Rep. 98-618, 98th Cong., 2d Sess. 7-8 (1984).[3]

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[3] Although Congress had established an effective date of December 1, 1984 for the new statutory requirement that the Secretary consider the combined effect of several unrelated impairments (see note 1, *supra*), the court of appeals also held that the class members whose claims had been denied prior to that date were entitled to have their claims reopened to permit a reconsideration of multiple impairments. App., *infra*, 22a-27a.

b. The Secretary's petition for rehearing with suggestion for rehearing en banc was denied by an equally divided court (App., *infra*, 28a-36a). In a dissenting opinion joined by three other judges, Judge Easterbrook disagreed with the panel's decision on the jurisdictional issues as well as the merits (*id.* at 29a-36a). He stressed that under *Califano* v. *Yamasaki*, 442 U.S. 682, 701, 704 (1979), every member of a class in an action brought under 42 U.S.C. 405 (g) must independently satisfy the "final decision" and 60-day filing requirements. With respect to the former, Judge Easterbrook observed that a court of appeals cannot "waive" the "final decision" requirement under 28 U.S.C. 1291 simply in order "to hear an interesting and important legal issue in mid-case" (App., *infra*, 30a), and he concluded that a court likewise cannot waive the "final decision" requirement under 42 U.S.C. 405(g). Judge Easterbrook explained that this Court's finding of jurisdiction in *Mathews* v. *Eldridge*, 424 U.S. 319, 330-332 (1976), was consistent with the practice of finality under 28 U.S.C. 1291, because the asserted right to a pretermination hearing was "irremediable on appeal" and "has nothing to do with the merits" of the claim. By contrast, the question in this case regarding the validity of the severity regulations "has everything to do with the merits of a claim for benefits, and if the Secretary is wrong the validity of the Step Two rule is reviewable on appeal" (App., *infra*, 30a-31a).

With respect to the 60-day filing requirement in 42 U.S.C. 405(g), Judge Easterbrook observed that "[t]ime limits in suits against the United States are not ordinary statutes of limitations," but instead "are substantive conditions on the consent to suit, and they apply unless they are expressly surrendered"

(App., *infra*, 32a). In this case, he believed that "[b]elatedly raising the point in district court is not an active surrender. It is closer to an act of negligence by the government's lawyer, an act that ought not eliminate a statutory limit on litigation against the United States" (*id.* at 33a).

On the merits, Judge Easterbrook concluded that the severity regulations serve a useful screening function and are a reasonable exercise of the Secretary's broad discretion to establish rules for the administration of the Social Security Act. App., *infra*, 36a. He also was of the view that the 1984 Act suggests that "Congress knew of and approved the sequential process in which 'severity' is one step" (*id.* at 36a).[4]

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning (i) the jurisdiction of a district court in a class action brought under 42 U.S.C. 405(g), and (ii) the validity of the severity step of the sequential evaluation process established by the Secretary for the adjudication of claims for disability benefits under the Social Security Act. Because these issues are before the Court in other cases, we do not believe that this case warrants plenary review. Rather, we suggest that the petition be disposed of as appropriate in light of the Court's rulings in the other cases.

The question whether the courts below properly excused the failure by the unnamed class members to comply with the "final decision" and 60-day filing requirements in 42 U.S.C. 405(g) is closely related to

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[4] The court of appeals has stayed its mandate pending certiorari insofar as it affirmed those portions of the district court's judgment that required the reopening of closed claims.

the jurisdictional issues presented in *Bowen* v. *City of New York*, No. 84-1923 (argued Feb. 26, 1986), and *Bowen* v. *Owens*, No. 84-1905 (argued Feb. 26, 1986). Similarly, the question of the validity of the severity regulations is presented in *Bowen* v. *Yuckert*, petition for cert. pending, No. 85-1409 (filed Feb. 21, 1986).

In *Yuckert*, the Ninth Circuit held that the severity regulations are invalid because (i) they do not provide for the claimant to establish a prima facie case of disability simply by showing that he cannot perform his own past work, and (ii) they do not provide for a specific consideration of the claimant's age, education, and work experience in every case. *Yuckert* v. *Heckler*, 774 F.2d 1365, 1369-1370 (1985), petition for cert. pending, No. 85-1409 (filed Feb. 21, 1986). By contrast, the court of appeals in the instant case invalidated 20 C.F.R. 404.1520(c) and 416.920(c) only to the extent that they do not provide for the claimant to establish a prima facie case by showing an inability to perform his prior work. App., *infra*, 22a. Application of the severity regulations has been sustained by the Seventh Circuit where the claimant does not show that he is unable to perform his past work. *Bunch* v. *Heckler*, 778 F.2d 396, 398 n.4 (1985).[5] Because the Ninth Circuit's holding in *Yuckert* invalidates step 2 of the sequential evaluation process on broader grounds, it is a more appropriate vehicle in which to resolve the dispute concerning the legality of the severity regulations.

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[5] The district court expressly rejected the contention that the Secretary is required to consider the claimant's age, education, and work experience at step 2 of the sequential evaluation process (App., *infra*, 58a).

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decisions on the jurisdictional issues in *Bowen* v. *City of New York*, No. 84-1923, and *Bowen* v. *Owens*, No. 84-1905, and in light of the Court's disposition of the petition for a writ of certiorari raising the question of the validity of the severity regulations in *Bowen* v. *Yuckert*, petition for cert. pending, No. 85-1409.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 85-1254, 85-1490

EDNA JOHNSON, ET AL., PLAINTIFFS-APPELLEES

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

Argued June 14, 1985

Decided July 30, 1985

Before BAUER and WOOD, Circui Judges, and GRANT, Senior District Judge.*

BAUER, Circuit Judge.

In this class action, applicants for and recipients of Social Security Disability Insurance Benefits challenge regulations promulgated by the Secretary of Health and Human Services. Plaintiff-applicants allege that the Secretary's regulations governing the

* The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

sequential evaluation for determining disability claims violate the Social Security Act and the Constitution by denying benefits at a threshold step even to those claimants who meet their prima facie burden under the Act, and by declining to consider the combined impact of nonsevere impairments in determining whether the threshold step is met. On September 19, 1984, 593 F. Supp. 375, after cross motions for summary judgment, the district court enjoined the Secretary from applying the challenged regulations and ordered her to redetermine class members' eligibility for benefits. On December 17, 1984, 607 F. Supp. 875, the district court denied the Secretary's motion for reconsideration based on the passage of the Social Security Disability Benefits Reform Act of 1984. We granted the Secretary's motion for a stay pending appeal and now affirm the district court.

I.

In this case plaintiffs essentially challenge a threshold step, known as "step two," in the Secretary's social security disability evaluation process. Effective February 1979 the Secretary amended the regulations promulgated by her under the Social Security Act to establish a five-step sequential evaluation process for determining eligibility for disability benefits. 43 Fed. Reg. 55349 (1978) (codified at 20 C.F.R. §§ 414.1520 & 416.920). The regulations provide:

> (b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
>
> (c) *You must have a severe impairment.* If you do not have any impairment(s) which sig-

nificantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment meets or equals a listed impairment in Appendix 1.* If you have an impairment which meets the duration requirement and is listed in Appendix 1, or we determine that the impairment is equal to one of the listed impairments, we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment, we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment, we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

20 C.F.R. 404.1520(b)-(f)(1).

The Secretary explained that the denials of claims under the step two severity regulation, 20 C.F.R. § 414.1520(c), were

> justified on the basis of medical considerations alone when the degree of a medically determinable impairment is found to be not severe. A non-severe impairment may consist of one or more separate conditions that do not significantly limit the individual's physical or mental capacity to perform basic work related functions. . . . When there is no significant limitation on the ability to perform these types of basic work related functions, an impairment will not be considered to be severe even though it may prevent the individual from doing work the individual has done in the past.

SSR 82-26. Social Security Rulings (SSR) are binding on all Social Security Administration (SSA) personnel, including state agency adjudicators, Administrative Law Judges (ALJs), the Appeals Council. 20 C.F.R. § 422.408. On August 20, 1980, the Secretary promulgated a list setting forth examples of impairments that were automatically to be held non-severe regardless of whether they prevented the claimant's performance of his "past work." *See* SSR 82-55.[1]

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[1] The examples given in SSR 82-55 of *per se* non-severe impairments include, *inter alia,* osteoarthritis corroborated by x-ray findings with the symptoms of pain and stiffness, hypertension, history of chest pain, colostomy, peptic ulcer, chronic liver disease, chronic renal disease, diabetes mellitus, epilepsy, and IQ of 80 or greater. The ruling emphasizes a national, generic concept of the level of health required for most jobs; "to be found disabled, an individual must have a severe medically determinable impairment. That standard cannot be satisfied by any impairment(s) that is compatible with the ability to perform basic work-related functions as required in most of the numerous jobs in the national economy." SSR 82-55.

The plaintiffs also challenge the Secretary's regulations concerning the combination of non-severe impairments in the determination of disability. On August 20, 1980, the Secretary further amended the disability regulations to provide that at step two of the process, § 414.1520(c), she would "consider the combined effects of unrelated impairments [in determining disability] only if all were severe." 45 Fed. Reg. 55574 (1980) (codified at 20 C.F.R. § 404.1522).

The named plaintiffs in this case demonstrate the effect of the Secretary's 1979 and 1980 amendments to her regulations and rulings. Named plaintiff Edna Johnson applied for Supplemental Security Income benefits on March 24, 1982. At that time Johnson suffered from diabetes, mellitus, lumbago, a duodenal ulcer, Echazski's ring of the esophagus, and anxiety neurosis. Johnson was a nurse's aide who had completed two years of high school. The job of nurse's aide requires "medium" exertional capacities. U.S. Dept. of Labor, Dictionary of Occupational Titles & Selected Characteristics (1981) (DOT). Johnson presented unrebutted evidence that due to her impairments, for which she had been hospitalized five times since 1970, she retained a residual functional capacity to perform only sedentary work and thus did not retain the capacity to perform her past work. After a hearing, an ALJ considered each of her impairments in turn and held that each one, taken separately, was "not severe," pursuant to step two of the regulation. The ALJ did not consider Johnson's inability to perform her past work as sufficient to satisfy the step two threshold test. Consequently, the ALJ denied benefits and the Appeals Council affirmed.

James Montgomery, the second named plaintiff, was afforded disability benefits by the Secretary in

November 15, 1976, due to diabetes and heart disease. On January 8, 1982, the Secretary informed Montgomery that he was no longer considered disabled and that his benefits ceased in October, 1981. At the hearing, held after Montgomery appealed the termination of his benefits, Montgomery presented unrebutted evidence that he suffered from hypertension, ischemic heart disease with angina pectoris, diabetes, mild obesity, degenerative osteoarthritis of the spine, and the effects of fractures of the hip, leg, and foot. Prior to the onslaught of his illnesses, Montgomery had worked for 28 years as a butcher, cutter, and boner in a meat packing plant. He has a sixth grade education. Montgomery presented uncontroverted evidence that he retained the residual functional capacity to perform no more than sedentary work due to his combined impairments. Montgomery's past job required "heavy" exertional capacity, although a butcher's job could also be classified as "medium." Therefore, Montgomery did not retain the residual functional capacity to perform his past work.

The ALJ reversed the reconsideration decision to terminate benefits, finding Montgomery still disabled. On its own motion, the Appeals Council reversed the ALJ's decision and reinstated the previous termination. The Council held that each of Montgomery's impairments considered singly were non-severe and did not consider the combined effects of the impairments or Montgomery's inability to perform his past work.

On August 11, 1983, Johnson and Montgomery filed an amended class complaint challenging the step two regulation on statutory and constitutional grounds and seeking a redetermination of the denial of benefits. The class was certified on December 7, 1983, and defined as:

> [a]ll persons in Illinois who are filing or have filed applications for disability benefits under Title II and/or Title XVI of the Social Security Act, and whose benefits are being or have been denied pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c), 404.1522, 416.920(c) and 416.922 (1982), and Social Security Rulings cum. ed. 82-55 (1982); and all recipients of such benefits who are making or have made claims for continued benefits . . . and whose benefits are being or have been terminated pursuant to the same policies.

Johnson v. Heckler, 100 F.R.D. 70, 72 (N.D.Ill. 1983).

On September 19, 1984, the district court held that the step two regulation and rulings violated the Act and required the Secretary to consider the "combined effect" of non-severe impairments. On September 17, 1984, the district court denied the Secretary's motion to alter or amend its earlier order based on the passage of the Social Security Disability Benefits Reform Act of 1984. Pub. L. 98-460.

On March 5, 1985, pursuant to the 1984 Act, the Secretary amended 20 C.F.R. § 404.1520(c) & 416.920(a) to direct her adjudicators to consider the combined effect of all of an individual's impairments in determining the existence of a severe impairment at step two. 50 Fed. Reg. 8726, 8727 (March 5, 1985). The amended regulations applied to "all Title II and Title XVI disability determination [made] . . . on or after December 1, 1984." *Id.* at 8727. On April 17, 1985, this court stayed "the effect of" the September 19, 1984, order pending this appeal, 604 F. Supp. 1070.

II. JURISDICTIONAL ISSUES

The Secretary first argues that the district court lacked jurisdiction because the plaintiff class has failed to exhaust its administrative remedies. Some of the plaintiff class members have not yet had a final administrative hearing. The district court waived the exhaustion requirement because it held that the plaintiff class had met both the futility and collateral claim tests for waiver. We think the district court was correct.

Congress has required that a Social Security claimant exhaust his administrative remedies before seeking judicial review. *See* 42 U.S.C. § 405(g). *See also Heckler v. Day*, —— U.S. ——, 104 S.Ct. 2249, 2251, 81 L.Ed.2d 88 (1984). Section 405(g) has been interpreted by the Supreme Court to contain two parts: first, a claim for benefits must have been filed; second, the Secretary must have made a final decision on that claim. *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 18 (1976). The first requirement is not waivable. The second requirement of a final decision, however, may be waived either by the Secretary or by the courts. *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013, 2023, 80 L.Ed.2d 622 (1984); *Mathews v. Eldridge*, 424 U.S. at 328, 96 S.Ct. at 899; *Giacone v. Schweiker*, 656 F.2d 1238, 1241-43 (7th Cir. 1981). A court may waive the exhaustion requirement when the plaintiff's claims are entirely collateral to his claim of entitlement and when the plaintiff's interest in having the issue resolved promptly is sufficiently great so as to render deference to the agency's judgment inappropriate. *Giacone*, 656 F.2d at 1243. Waiver also is appropriate where the pursuit of administrative remedies would be futile because the Secretary's position on

the statutory issues is "final." *Kuehner v. Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983), *remanded on other grounds*, —— U.S. ——, 105 S.Ct. 376, 83 L.Ed.2d 312 (1984); *Wright v. Califano*, 587 F.2d 345, 349 (7th Cir. 1978).

The Supreme Court's most recent ruling concerning the exhaustion requirements of collateralness and futility is *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984). The claim in *Ringer* arose from a January 1979 administrative instruction issued by the Secretary to all fiscal intermediaries in the Medicare system announcing that no payment was to be made for Medicare claims for bilateral carotid body resections (BCBRs) on the ground that such services were not "reasonable and necessary for the treatment of illness." Until October 1980, ALJs were not bound by the instruction and consistently ruled in favor of BCBR claims. On October 28, 1980, however, the Secretary issued a formal ruling prohibiting ALJs and the Appeals Council from ordering Medicare payments for BCBRs. Four Medicare claimants for whom BCBRs had been prescribed to relieve pulmonary problems brought suit. Three plaintiffs had had a BCBR before October 28, 1980, and filed claims for reimbursement with a fiscal intermediary of the Medicare program, while the fourth plaintiff never had the surgery, claiming he could not afford it. The plaintiffs sought a declaratory judgment that the Secretary's refusal to fund BCBRs was unlawful and an injunction compelling her to provide payment for the BCBRs.

The district court dismissed the complaint for lack of jurisdiction holding that plaintiff's failure to exhaust administrative remedies could not be waived because the plaintiffs' claim was essentially one for benefits and thus could not be collateral. The Ninth

Circuit reversed, holding, *inter alia*, that the claims were collateral and that exhaustion would be futile.

The Supreme Court reversed. The Court separated the plaintiffs into two groups. The Court held that Ringer, who had neither had the surgery nor filed a claim, had not satisfied the nonwaivable exhaustion requirement of § 405(g) because he had never given the Secretary an opportunity to rule on a concrete "claim" for reimbursement. *Ringer*, 104 S.Ct. at 2025. As to the other plaintiffs, the Court held that exhaustion of remedies was not futile because, on presenting a claim to the Secretary through the ALJ, the ALJ would not be bound by the October 28, 1980, ruling because the plaintiffs had had their BCBRs before October 28, 1980. 45 Fed.Reg. 71427 (1980).

The plaintiffs in this case are differently situated than were the plaintiffs in *Ringer*. First, all plaintiffs in the present class have met the *sine qua non* requirement of having filed a claim, *see Johnson v. Heckler*, 100 F.R.D. at 72-73 & n. 3, so that they, unlike Ringer, have given the Secretary an opportunity to rule on concrete "claims," *Ringer*, 104 S.Ct. at 2025, and thus meet the nonwaivable exhaustion requirement. Second, plaintiffs' claims are demonstrably more collateral and render exhaustion more futile than was the case for the other *Ringer* plaintiffs. The *Ringer* plaintiffs had already had surgery and were "at bottom" simply seeking reimbursement. *Ringer*, 104 S.Ct. at 2021. The plaintiffs in this case, however, do not seek the payment of benefits. Rather, they challenge the constitutional and statutory validity of portions of the Secretary's sequential evaluation process.

The district court's ruling will not guarantee the payment of disability benefits to plaintiffs as the

Ninth Circuit ruling would have guaranteed Medicare payments to the *Ringer* plaintiffs. Some but not all the class members in this case will be able to satisfy the step two severity regulations of the sequential evaluation process as the district court ordered it defined. Some may meet that test and yet fail to prove their disability at another level. Some may have their impairments combined and yet be unable to prove disability at another level. Under the district court's rulings, far more than mere "ministerial details," *Ringer*, 104 S.Ct. at 2021-22, would have to be adjudicated before the plaintiffs could be awarded benefits. Thus the plaintiffs' claims are sufficiently collateral to their benefit claims to justify waiver.

Furthermore, the futility test is met under the circumstances of this case. As the district court correctly noted,

> [t]he experience of the two named plaintiffs, who did exhaust, illustrates the futility of exhaustion—the Secretary's published policies are not likely to be influenced or changed by the administrative appeals of any single individual; thus the issue is unsuited to resolution in the hearing process. That the challenged policies are published both in the federal regulations and in Social Security Rulings further suggests the final nature of the Secretary's position. Finally, the validity of the policies challenged here has been raised in other litigation, giving the Secretary an ample opportunity to reconsider [but] she has not done so.

Johnson v. Heckler, 100 F.R.D. at 74 (citations omitted).

The Secretary's second jurisdictional argument arises from the sixty-day provision of section 205(g)

of the Act which provides that claimants must seek judicial review of the final decisions of the Secretary "within sixty days after the mailing . . . of notice of such decision or within such further time as the Secretary may allow." 42 U.S.C. § 405(g) (1982). The district court rejected the Secretary's claim, raised for the first time on her motion to alter or amend the court's order, that the sixty-day provision was an absolute jurisdictional bar to the plaintiffs' suit because some claimants did not seek the administrative or judicial review necessary to meet the sixty-day requirement. The district court reasoned that the sixty-day provision is a statute of limitations waivable by the parties and that the Secretary did not sufficiently raise the sixty-day provision as a defense in order to preserve it. We affirm the district court's reasoning.

The Supreme Court has ruled in two cases that the sixty-day limitation is not jurisdictional, *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), but "is waivable by the parties." *Eldridge*, 424 U.S. at 328 n. 9, 96 S.Ct. at 899 n. 9. This court has followed *Salfi*, *see Wilson v. Edelman*, 542 F.2d 1260 (7th Cir. 1976), as have other circuits, *see, e.g., City of New York v. Heckler*, 742 F.2d 729, 737-38 (2d Cir. 1984); *Lopez v. Heckler*, 725 F.2d 1489, 1508 (9th Cir.), *vacated on other grounds*, —— U.S. ——, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984); *Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 965, 973 n. 19 (8th Cir.1983).

Under the Federal Rules of Civil Procedure, Rule 8(c) and 12(h)(1), a party must raise a statute of limitations defense in the answer or other responsive

pleadings. Failure to raise the defense results in its waiver. 5 WRIGHT & MILLER FEDERAL PRACTICE AND PROCEDURE, CIVIL 1278 (1985 Supp.). The Secretary did not raise the sixty-day defense in her answer. She in fact admitted in the second paragraph of her answer that the court had jurisdiction under § 405 (g), and in her memorandum in opposition to class certification she focused only on the plaintiffs' failure to exhaust administrative remedies. The district court properly held therefore that the Secretary had waived the statute of limitations defense.

III. THE STEP TWO SEVERITY REGULATION

The Social Security Act is one of the most important and far-reaching enactments ever passed by Congress, affecting the life of almost every American. The Act is subject to constant amendment in the light of the changing socioeconomic conditions of our society, and is composed of numerous specialized programs, two of which are involved in this case: Old Age, Survivors and Disability Insurance (OASDI), Title II, 42 U.S.C. §§ 401 *et seq.*, and Supplemental Security Income for the Aged, Blind, and Disabled (SSI), Title XVI, 42 U.S.C. §§ 1381 *et seq.* The SSI program grew out of state-administered programs and is not an offshoot of OASDI; generally speaking, SSI provides additional income to disabled recipients who are in some cases able to work despite the continuation of their impairments. Despite the differences in the two programs, *see generally*, H.REP. NO. 98-618, 98 Cong.2d Sess. (1984), *reprinted in* 1984 U.S.CODE CONG. & AD.NEWS 3038, 3065-71, they nonetheless share a common definition of disability.

Both OASDI and SSI provide that

> (1) The term "disability" means—
>
> (A) inability to engage in any substantial gainful activity by reason of medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . .
>
> (2) For purposes of paragraph (1)(A)—
>
> (A) an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence . . . "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 423(d)(1)(A), (2)(A) & 42 U.S.C. § 1382c(a)(3)(A), (B) & (C). The definition of disability as defined in 42 U.S.C. § 423(d)(1)(A) was first promulgated in 1954, and was incorporated into the full-fledged disability insurance program cre-

ated in the Social Security Amendments of 1956, P.L. 84-880. *See* H.REP. No. 7225, 84th Cong., 2d Sess. (1956), U.S.Code Cong. & Admin.News 1956, p. 3877. The further definition of eligibility for disability insurance provided in 42 U.S.C. § 423(d)(2)(A) was added in 1967. S.REP. No. 744, 90th Cong., 1st Sess. 46-50, *reprinted in* 1967 U.S.CODE CONG. & AD.NEWS 2834, 2880-83. For a thorough discussion of the history of the disability provisions, see *Stone v. Heckler*, 752 F.2d 1099, 1104-05 (5th Cir.1985), and *Chico v. Schweiker*, 710 F.2d 947, 948-49 (2d Cir.1983).

Pursuant to this history and statutory definition the courts of all twelve circuits have unanimously held that, while the ultimate burden of proving disability lies with the claimant, the plaintiff makes a prima facie showing when he demonstrates an impairment which prevents him from performing his previous work. The burden then shifts to the Secretary to show that the claimant remains capable of performing other work in view of the vocational factors of age, education, and work experience: "[o]nce an impairment of sufficient, severity is demonstrated . . . which precludes the type of work previously engaged in, the burden of going forward shifts to the Secretary." *Whitney v. Schweiker*, 695 F.2d 784, 786 (7th Cir.1982). *See also Francis v. Heckler*, 749 F.2d 1562, 1564 (11th Cir. 1985); *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir.1984); *Smith v. Califano*, 592 F.2d 1235, 1236-37 (4th Cir.1979); *O'Banner v. Secretary*, 587 F.2d 321, 323 (6th Cir.1978); *Bastien v. Califano*, 572 F.2d 908, 912, (2d Cir.1978); *Hall v. Secretary*, 602 F.2d 1372, 1375 (9th Cir.1979); *Lewis v. Weinberger*, 515 F.2d 584, 587 (5th Cir. 1975); *Hernandez v. Weinberger*, 493 F.2d 1120,

1123 (1st Cir.1974); *Stark v. Weinberger*, 497 F.2d 1092, 1097-98 (7th Cir.1974); *Garrett v. Richardson*, 471 F.2d 598, 603-04 (8th Cir.1972); *Choratch v. Finch*, 438 F.2d 342, 343 (3d Cir.1971); *Meneses v. Secretary*, 442 F.2d 803, 807 (D.C.Cir.1971). All the circuits agree that it is the language of the Act itself which requires "that disability determinations be made according to a two-step process," *Valencia v. Heckler*, 751 F.2d 1082, 1086 (9th Cir.1985), with the first step placing the burden on the claimant to demonstrate an inability to perform past work.

The plaintiffs' argument is, therefore, apparent: the Secretary's step two policies on their face violate the Act because they deny benefits even to the plaintiff who has carried his prima facie burden and permit the denial of benefits at step two where the claimant's impairment does not significantly impair the claimant's physical or mental ability to do basic work activities. On its face, the plaintiffs argue, this regulation is not designed to determine whether the claimant can meet, or has met, his prima facie burden of proving his inability to do his own past work. The Secretary has promulgated a list of twenty illustrative impairments to be considered *per se* nonsevere under step two. *See* SSR 82-55. The Secretary denies benefits to claimants with these impairments regardless of whether they have shown an inability to do their past work. The Secretary's ruling confirms this interpretation: step two permits the denial of benefits "even though [the impairment] may prevent the individual doing work that the individual has done in the past." SSR 82-56.

Plaintiffs argue, moreover, that step two does not provide for the individualized assessment of disability guaranteed by the Act. The Act provides that an

individual will be found disabled when his "physical or mental impairment or impairments are of such severity that *he* is not only unable to do *his* previous work, but cannot, considering *his* age, education, and work experience, engage in any other kind of substantial gainful work . . . ." 42 U.S.C. §§ 423(d)(2) & 1382c(a)(3)(B) (emphasis added). The Supreme Court has recognized that "disability hearings will be individualized determinations." *Heckler v. Campbell*, 461 U.S. 458, 467, 103 S.Ct. 1952, 1957, 76 L.Ed.2d 66 (1983). Step two, by contrast, permits the Secretary to label a claimant as not disabled, even though his impairments *in fact* prevent *him* from doing *his* past work. Such summary dispositions were in fact made in the cases of the two named plaintiffs in this case.

The plaintiffs suggest that if the second step merely screened out claimants whose impairments were so slight or "de minimus" that they could never prevent any claimant from doing his past work, the second step would in fact comport with the Act. Several circuits have in fact interpreted step two to permit a denial of benefits only when disabilities are "de minimus." In *Taylor v. Schweiker*, 739 F.2d 1240 (7th Cir. 1984), this circuit seemed to characterize the step two severity test as an "initial screening device which eliminates [claims] . . . only when the limitations alleged . . . can be viewed as slight." *Taylor*, 739 F.2d at 1243 n.2. The court in *Taylor* reversed the ALJ's finding of non-severity and remanded the case because the Secretary's second step test had precluded consideration of evidence that might have established the claimant's disability.

Similarly construing step two to permit only a "de minimus" assessment, the Fifth Circuit stated:

> we will in the future assume that the ALJ and Appeals Council have applied an incorrect standard to the severity requirement unless the correct standard is set forth by reference to this opinion or another of the same effect or by an express statement that the construction we give to 20 C.F.R. § 404.1520(c) (1984) is used. Unless the correct standard is used, the claim must be remanded to the Secretary for reconsideration.

Stone v. Heckler, 752 F.2d 1099, 1106 (5th Cir. 1985). *See also Brady v. Heckler*, 724 F.2d 914 (11th Cir. 1984). *Cf. Delgado v. Heckler*, 722 F.2d 570 (9th Cir. 1983) (acknowledging without deciding the potential conflict between the regulations and the statutory burden of profit. *Chico v. Schweiker*, 710 F.2d 947 (2d Cir. 1983) (same). Plaintiffs argue, however, that the Secretary's regulations do not utilize and in fact do not permit a "de minimus" reading and therefore must be invalidated.

The Secretary argues on appeal that her broad authority to regulate permits her to adopt step two, that for the policy reason of promoting efficiency step two is necessary, and, finally,that Congress through the 1984 Amendment to the Act "endorsed the workings of the sequential evaluation process." Appellant's Br. at 29. It is the 1984 Amendment argument on which the Secretary relies most heavily.

Step two of the sequential evaluation process was not, however, the focal point of the 1984 Amendment, contrary to the Secretary's sweeping assertions. To the extent that Congress in the 1984 Amendment addressed step two, Congress disapproved of the Secretary's "severity" regulations and

relied on the upcoming revision of the evaluation process to remedy its disapproval:

> The Committee is concerned that the consideration of eligibility for disability benefits be conducted using criteria that clearly reflect the intent of Congress that all those who are unable to work receive benefits. It is of particular concern that the Social Security Administration has been criticized for basing terminations of benefits solely and erroneously on the judgment that the person's medical evaluation is "slight," according to very strict criteria, and is therefore not disabling, without making any further evaluation of the person's ability to work.
>
> The Committee believes that in the interests of reasonable administrative flexibility and efficiency, a determination that a person is not disabled may be based on a judgment that the person has no impairment, or that the impairment or combination of impairments are slight enough to warrant a presumption that the person's work ability is not seriously affected. The current "sequential evaluation process" allows such a determination, and the committee does not wish to eliminate or seriously impair use of that process. However, the Committee notes that the Secretary has already planned to re-evaluate the current criteria for non-severe impairments, and urges that all due consideration be given to revising those criteria to reflect the real impact of impairments upon the ability to work.

H. REP. No. 98-618, 98th Cong., 2d Sess. 7-8, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3044-

45. The House Report reflects a Congressional suspicion that the Secretary's step two regulations did not comport with the original intent of the Social Security Act, but stops short of condemning the regulations, relying instead on the Secretary's promised reevaluation of the regulations. The suspicion evidenced in the House Report's analysis of step two is derivative of the general purpose of the 1984 Amendment, which was to help "insure that no beneficiary loses eligibility for benefits as a result of careless or arbitrary decision making by the Federal government." *Id.* at 3039. The theme of the 1984 Amendment was in fact remedial. Noting that it was "deeply concerned about the erosion of public faith and confidence in the social security disability programs," *id.*, the committee expressed hope that the 1984 Amendment would ensure that "the program will be administered according to the law, rather than by constantly shifting and possibly arbitrary policies." *Id.* at 3040.

The legislative history of the 1984 Amendment cuts against, rather than supports, the Secretary's arguments in this case. The House Report supports at least a "de minimus" interpretation of the regulation and at most evidences a skepticism about the over-all validity and workability of the step two severity regulation. The Secretary cites no substantive responsive legislative history of the 1984 Amendment to the contrary. Thus we are convinced that Congress did not in the 1984 Amendment "endorse" step two and, to the contrary, expressed disapproval of the regulation. Moreover, on its face, the step two severity regulation conflicts with the Social Security Act's purposes and the plain language of the statute's definitions of disability.

The Secretary's argument that step two is a reasonable exercise of her broad rule-making authority necessary to the proper and efficient functioning of "an already overburdened agency," Appellant's Br. at 34, *quoting Heckler v. Campbell*, 461 U.S. at 468, 103 S.Ct. at 1958, is a fall-back argument merely, and a thoroughly unpersuasive one. The district court rejected the Secretary's reliance on her broad rule-making authority, reasoning that, to merit deference, the Secretary's regulations and rules must be consistent with the Act. The district court's conclusion is firmly grounded in the law: an agency's "interpretation of the statute cannot supercede the language chosen by Congress." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980). *See also United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150 2156, 53 L.Ed.2d 48 (1977). Because we have held the Secretary's regulations to be inconsistent with the statute, no deference to her rule-making authority is required.

The Secretary's efficiency arguments, therefore, are a totally inappropriate basis upon which to justify unlawful activity and add no support to her argument that we must defer to her statutory mandate to promulgate regulations. The extent to which the need for efficiency and an easing of the "burdens" on the ALJs affects our standard of review of disability decisions in this circuit is still a matter of debate. *Compare Stephens v. Heckler*, 766 F.2d 284 (7th Cir. 1985), *with Zblewski v. Schweiker*, 732 F.2d 75 (7th Cir. 1984). *Zblewski* stresses the need for a "minimum level of articulation," *Zblewski*, 732 F.2d at 78, in ALJ findings, while *Stephens* argues that, in light of the "burdens" on the ALJs, "sketchy opinions can be enough." *Stephens*, at 287. What is

not debatable, however, is that efficiency arguments provide absolutely no basis for the Secretary to violate Congressional mandates to implement properly the disability benefits program of this nation.

In summary then, we affirm the district court's order holding that 20 C.F.R. §§ 404.1520(c) & 416.920(c) (1982), and SSR 82-55 & SSR 82-56 violated 42 U.S.C. § 423(d) and § 1382c(a)(3)(A), (B), (C), and enjoining the defendants from enforcing the step two rules and regulations. *See also Dixon v. Heckler*, 589 F.Supp. 1494 (S.D.N.Y. 1984) (class action lawsuit also invalidating the step two rules and regulations); *Smith v. Heckler*, 595 F.Supp. 1173 (E.D. Cal. 1984) (same). *See also Moody v. Heckler*, 612 F.Supp. 815 (C.D. Ill. 1985) (single plaintiff action holding that the step two severity regulation violates the Social Security Act).

IV. THE COMBINATION REQUIREMENT

The parties agree that the 1984 Amendment specifically requires the Secretary to combine non-severe impairments at the step two stage of the sequential evaluation process in determining eligibility for disability benefits effective December 1, 1984. 50 Fed. Reg. 8726-29 (March 5, 1985). The Secretary argues that the Reform Act created this right for the first time and that therefore she should not be required to redetermine the claims of the class members denied benefits prior to December 1, 1984. In its original decision, announced before the enactment of the Reform Act, the district court held that the plain meaning of the statute as construed by other courts required the Secretary to consider the combined effect of all of the claimants' impairments and declared invalid the regulations of the Secretary

which stated "we will consider the combined effects of unrelated impairments only if all are severe and expected to last 12 months." 42 U.S.C. §§ 404.1522 & 416.922. The district court also declared invalid SSR 82-55, which states "[i]nasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work related functions to do most jobs." In its order dated December 17, 1984, the district court refused to alter or amend its prior ruling, in light of the 1984 Amendment, holding that Congress intended to clarify the Act through the 1984 Amendment and that therefore its prior order could be applied retroactively to members of the plaintiff class. We cannot, as the Secretary now urges, find any error in either of the district court's decisions.

In determining whether the Act prior to the 1984 Amendment required impairments to be cumulated at the step two severity test of the sequential disability evaluation process, we must look "first, as always, to the language of the statute." *Heckler v. Turner*, —— U.S. ——, ——, 105 S.Ct. 1138, 1144, 84 L.Ed.2d 138 (1985). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'n*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940). For decades, the Act has decreed that, in applying the basic definition of disability, the Secretary shall determine a claimant to be disabled "if his physical or mental impairment or *impairments* are of such severity that he is not only unable to do his previous work but cannot . . . engage

in any other kind of substantial gainful work." 42 U.S.C. §§ 423(d)(2)(A) & 1382c(a)(3)(B) (emphasis added). The Act further defines a physical or mental impairment as one that "results from . . . *abnormalities* . . . demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3) & 1382c(a)(3)(C) (emphasis added). The Act does not use the singular "physical or mental impairment" or "abnormality"; rather Congress, through the Act, included the possibility of multiple "*impairments*" constituting a disability.

Moreover, when the amendments to the statutory definition of disability were passed in 1968, the Secretary agreed that the Act required her to consider the combined effects of the non-severe impairments in determining whether a claimant was disabled. *See* 33 Fed. Reg. 11749, 11750 (1968), codified at 20 C.F.R. § 404.1501(a)(1) (1969) (defining disability as "inability to engage in any substantial gainful activity by reason of . . . impairment or *impairments*") (emphasis added). The "contemporaneous administrative construction of [an] Act is persuasive evidence of the original understanding." *United States v. Sheffeld Board of Commissioners*, 435 U.S. 110, 131, 98 S.Ct. 965, 979, 55 L.Ed.2d 148 (1978). Other federal courts also have construed the Act in a manner consistent with the Secretary's original construction, requiring the Secretary to consider the combined effect of non-severe impairments. *See, e.g., Brady v. Heckler*, 724 F.2d 914, 921 (11th Cir. 1984); *Felshina v. Schweiker*, 707 F.2d 71, 73 (2d Cir. 1983); *Camp v. Schweiker*, 643 F.2d 1325, 1333 (8th Cir. 1981); *Brenem v. Harris*, 621 F.2d 688, 690 (5th Cir. 1980); *Hicks v. Gardner*, 393 F.2d 299, 302 (4th Cir. 1968).

The district court found that the regulations and rulings of the Secretary were contrary to the plain

meaning of the statute, calling "dubious" the logic of her ruling which finds that a combination of non-severe impairments cannot be severe. *See* SSR 82-55. *Johnson v. Heckler*, 593 F. Supp. at 381. The court indicated that the "proper interpretation" of the statute required that the Secretary not "fragmentize" the impairments, but rather "treat them in combination." *Id., quoting Griggs v. Schweiker*, 545 F. Supp. 475, 477 (S.D.W.Va.1982). The court therefore declared the regulations and rulings invalid. Our analysis above confirms the correctness of the district court's conclusion.

The 1984 Amendment does not change the propriety of the court's decision, as the court correctly held in denying the Secretary's motion to alter or amend. Even if we had only the general statements of purpose of the 1984 Amendment discussed above, the conclusion that the 1984 Amendment was meant to clarify the original interpretation of Congress that non-severe impairments must be combined to determine whether a disability exists would be obvious. As the earlier discussion indicated, the 1984 Amendment was remedial in character and intended to liberalize the present policies so as to "restore confidence" in social security programs. 1984 U.S. CODE CONG. & AD. NEWS, 98th Cong., 2d Sess. 3040. Indeed, the stated agenda of the Congress was to ensure that those disability decisions which had been made pursuant to "constantly shifting and possibly arbitrary policies" would instead be "administered according to the law." *Id.*

The specific references in the 1984 Amendment's legislative history to the amendment of the multiple impairments section confirms this general assessment of the purposes of the 1984 Amendment. In the enactment of the 1984 Amendment, the House bill was

passed in lieu of the Senate bill. Section 103 of the House bill concerned the combination of impairments at step two. In its overview, the House Committee stated that "sections 101-103 of the bill are designed to *clarify* the criteria that must be used in evaluating whether new applicants or current beneficiaries are disabled. The criteria laid out in present law are few and brief." H.REP. NO. 98-618, 98th Cong. 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS, 3043 (emphasis added). Moreover, "[t]here is no statutory provision concerning the consideration of the combined effects of a number of different impairments." *See also* H. CONF. REP. NO. 98-1039 at 29, *id.* at 3087. The Committee further stated that

> [t]he committee further emphasizes that the foregoing discussion does not constitute any change in the current definition of disability, but rather is a *clarification* of the intent of Congress that disability benefits should be granted to those who are unable to work because of a medically determinable impairment. Sections 101 and 103 of the bill provide statutory standards for determining disability.

H. REP. NO. 98-618. *Id.* at 3046 (emphasis added). This subsequent legislation interpreting the earlier Social Security Act is "entitled to great weight in determining the meaning of the earlier statute." *Regents of the University of California v. Bakke*, 438 U.S. 265, 349, 98 S.Ct. 2733, 2778, 57 L.Ed.2d 750 (1978). This review, therefore, of the legislative history of the 1984 Amendment convinces us that the original intent of Congress was to ensure that non-severe impairments were combined in determining whether a disability exists. The plain language of the statute yields the same conclusion. The district court's

order declaring §§ 404.1522 & 416.922 and SSR 82-55 invalid because they are inconsistent with §§ 423(d)(2)(A) & 1382c(a)(3)(B) of the Act is therefore affirmed, and the Secretary is ordered on remand to redetermine the plaintiffs' disability claims considering the effects of combining all non-severe impairments at step two of the sequential evaluation process.

In conclusion, then, we affirm the district court's denials of the Secretary's summary judgment motions on jurisdictional grounds. We also affirm the district court's order enjoining the Secretary from enforcing 20 C.F.R. §§ 404.1520(a)-.1522 & 416.920(c)-.922 and SSRs 82-55 & 82-56 insofar as they violate the Act. We affirm the district court's order directing the Secretary to hold new hearings for all class members, including the named plaintiffs, in conformance with the law as expressed in this opinion, and to reinstate benefits and/or grant retroactive benefits as is appropriate pursuant to this opinion.[2]

AFFIRMED.

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[2] Because we have found that the Secretary's regulations are inconsistent with the Act, we need not address the plaintiffs' broader constitutional claims that the Secretary's regulations deny the plaintiffs due process.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 85-1254 & 85-1490

EDNA JOHNSON and JEROME MONTGOMERY, on their own behalf and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES

v.

MARGARET M. HECKLER, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

On Suggestion of Rehearing En Banc

DECIDED OCTOBER 30, 1985

Before BAUER and WOOD, *Circuit Judges*, and GRANT, *Senior District Judge.**

PER CURIAM. On September 9, 1985, the appellant filed a petition for rehearing and suggestion of rehearing en banc in this case. All of the judges on the panel have voted to deny the petition for rehearing. One of the judges in regular active service requested a vote on the suggestion of rehearing en banc, which failed to receive the votes of a majority. Judges Eschbach, Posner, Coffey, Easterbrook, and Ripple voted to grant rehearing en banc.

The petiiton for rehearing is

DENIED.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

EASTERBROOK, *Circuit Judge*, with whom ESCHBACH, POSNER, and COFFEY, *Circuit Judges*, join, dissenting. The court denies rehearing en banc in this case by an equal division of the judges. Our inability to proceed is not likely to be the end, however. This case has three issues: (1) whether a court may rule on substantive questions in pending disability cases prior to the Secretary's decision; (2) whether a court may order the reopening of cases when the suit is filed more than 60 days after the administrative decision became final; (3) whether the regulations (the Step Two rules) used to determine the existence of a "severe" impairment are unlawful. The Supreme Court has granted review of the first two issues. *City of New York v. Heckler*, 742 F.2d 729 (2d Cir. 1984), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985); *Owens v. Heckler*, No. CV-2436-WMB (C.D. Cal. Aug. 28, 1984), *prob. jur. noted*, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985). The third issue affects tens of thousands of administrative cases every year and deserves review independently.

1. *Califano v. Yamasaki*, 442 U.S. 682, 701, 704 (1979), holds that every member of a class must independently satisfy all requirements of suit. That means that a court must ask, with respect to the class members whose claims are pending before the Secretary, whether they could have filed individual suits seeking declaratory judgments that the Step Two rules violate the statute. The answer is no. The pertinent statute, 42 U.S.C. § 405(g), states that a person may sue only after a "final decision of the Secretary". When a person still has a claim pending there is no "final decision."

The panel concluded that the final decision requirement is "waivable" by the court. "Waiver" does not

come naturally to a finality requirement. Finality in the sense of "the last order in the case" is familiar under 28 U.S.C. § 1291, and no one thinks a court may "waive" this requirement to hear an interesting and important legal issue in mid-case. See, e.g., *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757 (1985); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Finality in the sense of administrative exhaustion is a bit different, for here finality is designed for the protection of the administrave process. Again a court may not excuse the lack of finality. *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980). If any one may waive the requirement, that must be the Secretary rather than the court. *Weinberger v. Salfi*, 422 U.S. 749, 766 & n.9 (1975), accordingly held that the *Secretary* may, by regulation, stipulate that an interim step is "final." See also *Heckler v. Ringer*, 104 S. Ct. 2013, 2017 & n.2 (1984). But the regulation on the point, 20 C.F.R. §§ 404.923-404.928, allows immediate review only when the claimant attacks the constitutionality of part of the Act and all other issues have been settled.

The Supreme Court used the language of "waiver" to assess jurisdiction to hear social security cases in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The use of "waiver" in *Eldridge* was consistent with the practice of finality under § 1291. The question in *Eldridge* concerned a constitutional entitlement to a pretermination hearing. If that question is not reviewable immediately, it never is. The decision therefore could be said to be "final" in the same sense a collateral order is final: (a) it is irremediable on appeal, and (b) it has nothing to do with the merits. See *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815-17 (1985). Here, however, the question at issue has

everything to do with the merits of a claim for benefits, and if the Secretary is wrong the validity of the Step Two rule is reviewable on appeal. The panel held the Step Two regulations invalid precisely *because* they affect the merits of cases. And it also pointed out (769 F.2d at 1208) that in many of the class members' cases the Step Two regulations will be irrelevant: the claimants may meet the regulations as they are, or they may fail on other grounds. This decision is about as intertwined with the merits as they come. Under *Richardson-Merrell* it cannot be "collateral."

The Fourth Circuit has said that a court may excuse administrative exhaustion only when the question is "wholly collateral" to the claim for benefits, see *Hyatt v. Heckler*, 757 F.2d 1455, 1460 (1985), and that is the right approach. Accord, *Hatcher v. Heckler*, 772 F.2d 427, 430-32 (8th Cir. 1985). *Ringer*, in which the Supreme Court held review impermissible because the regulation attacked by the plaintiff was "intertwined" with the merits of the case (see 104 S. Ct. at 2023-24), all but compels it. As the Court said, the "waiver" approach "*is inapplicable* here where respondents do not raise a claim that is not *wholly* 'collateral' to their claim for benefits under the Act." 104 S. Ct. at 2023 (emphasis added).

It is tempting to say: Who cares? Once the court has held the regulations invalid in a case in which the plaintiff did exhaust, the other claimants still in the works get the benefit. Perhaps, but the real problem lies in future decisions. The decision does not (and under *Yamasaki* cannot) turn on the fact that these plaintiffs are rolled in a class rather than filing individual suits. The *holding* of this case is that anytime a claimant challenges a regulation of the Secre-

tary—a regulation an ALJ cannot alter—the claimant may seek review of that regulation without obtaining a final decision on the merits. That cannot be squared with *Ringer*. There are thousands of regulations, millions of claimants. This decision could multiply substantially the number of suits filed in pursuit of benefits. The finality requirement of § 405(g) was intended to prevent this.

2. The panel also held that the class may contain people who did not file suit within 60 days of receiving a final decision, as § 405(g) requires. This means that closed cases must be reopened, and in substantial numbers. The rationale is that the 60 day rule is a "statute of limitations," which is waived if not pleaded in the answer to the complaint, 769 F.2d at 1208-09. Although two of the Supreme Court's cases (*Salfi* and *Eldridge*) use the words "statute of limitations" in referring to the 60 day rule, neither case concerned the appropriate characterization of the time limit. Several other circuits preceded our panel in following the Supreme Court's dictum, but I think they have given the Court's casual words altogether too much weight. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341-42 (1979); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 459-62 (1978).

The problem with the characterization is that this is a suit against the United States. Time limits in suits against the United States are not ordinary statutes of limitations. They are substantive conditions on the consent to suit, and they apply unless expressly surrendered. *Soriano v. United States*, 352 U.S. 270, 275-76 (1957); *Munro v. United States*, 303 U.S. 36, 41 (1938); *Finn v. United States*, 123 U.S. 227, 232-33 (1887). *Cf. Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (the United States is immune from suit

save as its consents, "and the terms of its consent define the court's jurisdiction to entertain the suit"). Belatedly raising the point in the district court is not an active surrender. It is closer to an act of negligence by the government's lawyer, an act that ought not eliminate a statutory limit on litigation against the United States.

3. The decision on the merits of the Step Two rules has substantial continuing importance. In administering any program of this scope, the Secretary must lay down rules that confine the discretion of the administrative law judges. There are more than 800 ALJs in the social security system, each with a different approach to disability cases. In order that the program not deteriorate into inconsistent and arbitrary decisions turning more on the ALJ's charity than on legal criteria, there must be rules. The rules must have teeth to be effective. Yet all rules with teeth also may yield error. When the Secretary strives for generality and consistency, she creates a risk that some people who might have qualified for benefits under an approach of unguided case-by-case decisionmaking will lose out. See *DeLong v. Heckler*, 771 F.2d 266, 268 (7th Cir. 1985); *Stephens v. Heckler*, 766 F.2d 284, 285-86, 288-89 (7th Cir. 1985); *Garrison v. Heckler*, 765 F.2d 710, 714 (7th Cir. 1985); cf. Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 106-23 (1983).

The panel's decision holding the definition of "severe" impairment invalid points to this potential for error. The potential is there; it is there whenever rules exist. Yet unless the rules create too many improper denials of benefits, they do more good than harm. The rules involved here do not create a very

large risk of erroneous denial. The Secretary's regulations are meek. They make the test whether an impairment "significantly" limits the ability to work. In cases such as *Taylor v. Schweiker*, 739 F.2d 1240, 1243 n.2 (7th Cir. 1984), and *Wallschlaeger v. Schweiker*, 705 F.2d 191 (7th Cir. 1983), we characterized this as a useful screen to focus attention on a threshold requirement, to filter out people without a hope of getting benefits, and to direct the attention of the ALJs to those with serious cases. The ALJs have a hard enough time as it is; I do not think claimants as a whole will gain from a judicial order that hinders this intelligent process through which the claimants with the best cases receive the most attention. (The panel's decision does not specify whether it bars the use of any Step Two hurdle or whether it just thought this step too high. I assume it meant the former, because the way the regulation is worded it is hard to imagine a lower step that would serve any purpose.)

If there were something in the statute that forbade the Step Two rules or the sequential process in general, that would be that. But the statute calls for the Secretary to determine disability and is all but empty of advice about how to do this. The Secretary has had to make it up as she goes along. The argument that the Step Two rules focus attention in a way that will lead people to slip through the cracks could be made against every other regulation in C.F.R. The Supreme Court has held, however, that because of the vague nature of the mandate the Secretary has especially broad authority to issue regulations. E.g., *Herweg v. Ray*, 455 U.S. 265, 275 (1982); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981). Some error is inevitable. How much is too much—and there-

fore how much rulishness is best—are administrative matters. Only someone with knowledge of the entire process, including other occasions for error and ways in which risks of error may be offset, is in a good position to make such a decision. That someone is the Secretary.

The Vocational Grid is much more restrictive, and it creates a much greater chance of slipping through the cracks than do the Step Two rules. Yet the Court sustained the Grid as a useful though imperfect way to carry on an almost impossibly difficult task. *Heckler v. Campbell*, 461 U.S. 458 (1983). It remarked: "Where, as here, the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceed the Secretary's statutory authority and whether they are arbitrary and capricious." *Id.* at 466. The Court cited a series of cases in which it has sustained other regulations concerning the Social Security Act. See *Herweg* and *Gray Panthers*. All of those regulations have the defect the panel found in the Step Two rules—the potential to deny benefits to people who might get them after a fuller inquiry.

More recently the Court has held that unless the statute in express terms settles a dispute, a court ought not interfere with the program of implementation selected by the responsible agency. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782-83 (1984). Nothing in the social security statute addresses phased decision-making such as the Step Two rules. No debates in Congress indicate dissatisfaction with the way the Secretary is proceeding. To the extent the 1984 amendments bear on the question, they support the

Secretary's position. Section 4(a)(1) of the amendments requires: "If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process." This suggests that Congress knew of and approved the sequential process in which "severity" is one step. I therefore think we should leave questions like this to the administrators, who both tailor the rules to the entire program and bear political responsibility for the results.

A true Copy:

Teste: .....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 30, 1985

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. HARLINGTON WOOD, JR., *Circuit Judge*

HON. ROBERT A. GRANT, *Senior District Judge* *

Nos. 85-1254 and 85-1490

EDNA JOHNSON and JEROME MONTGOMERY, on their own behalf and on behalf of others similarly situated, PLAINTIFFS-APPELLEES,

vs.

MARGARET M. HECKLER, Secretary, U.S. Department of Health and Human Services, DEFENDANT-APPELLANT

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 83 C 4110—Judge Nicholas J. Bua

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* The Honorable Robert A. Grant, Senior Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

JUDGMENT—ORAL JUDGMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX D

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 83 C 4110

EDNA JOHNSON and JEROME MONTGOMERY, on their behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY, DEPARTMENT OF HEALTH and HUMAN SERVICES, DEFENDANT

Dec. 7, 1983

MEMORANDUM OPINION AND ORDER

BUA, District Judge.

Plaintiffs Edna Johnson and Jerome Montgomery have moved to maintain this suit as a class action pursuant to Fed. R. Civ. P. 23. For the reasons set forth below, plaintiffs' motion is hereby granted.

Background

Named plaintiffs Edna Johnson and Jerome Montgomery bring this action to challenge certain interrelated regulatory policies of defendant, the Secretary of the Department of Health and Human Services (the Secretary), governing the evaluation of disability claims brought under the Old Age, Survivors

and Disability Insurance ("OASDI") program and the Supplemental Security Income ("SSI") program. The Secretary's sequential regulatory scheme, by which she evaluates disability claims under either program, 20 C.F.R. §§ 404.1520 *et seq.* and 416.920 *et seq.*, interprets the statutory disability requirements of 42 U.S.C. §§ 423(d) and 1382c(a)(3)(A), (B), (C) to require each claimant to initially establish that he or she has a "severe physical or mental impairment." In determining whether a claimant has a "severe" impairment, it is defendant's policy: (1) to refuse to consider vocational factors and residual functional capacities, 20 C.F.R. §§ 404.1520(c) and 416.920(c);[1] and (2) to refuse to combine "nonsevere" impairments, 20 C.F.R. §§ 404.1522, 416.922[2] and Social Security Ruling ("SSR") 82-55 (1982). Plaintiffs allege in their First Amended Complaint that these two interrelated regulatory policies violate their statutory rights under 42 U.S.C. §§ 423(d) and 1382c(a)(3)(A), (B), (C). In addition, plaintiffs allege that the Secretary's policies violate their constitutional right to equal protection under the due process clause of the Fifth Amendment to the U.S. Constitution.

The proposed definition of the class, as stated in plaintiffs' amended motion for class certification, includes:

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[1] 20 C.F.R. §§ 404.1520 and 416.920 (1982) were promulgated as final regulations to be effective in February, 1979. 40 Fed. Reg. 55363 and 55371 (November 29, 1978) to be codified as 20 C.F.R. §§ 404.1503(c) and 416.903(c). These regulations were recodified as 404.1520(c) and 416.920(c) in 45 Fed. Reg. No. 163 (August 20, 1980).

[2] 20 C.F.R. 404.1522 and 416.922 (1982) were promulgated in August, 1980. 45 Fed. Reg. 55566 *et seq.* (August 20, 1980).

> All persons in Illinois who are filing or have filed applications for disability benefits under Title II and/or Title XVI of the Social Security Act, and whose benefits are being or have been denied pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1522, 416.920(c) and .922 (1982), and Social Security Rulings cum. ed. 82-55 (1982); and all recipients of such benefits who are making or have made claims for continued benefits (through participation in a Continuing Disability Interview), and whose benefits are being or have been terminated pursuant to the same policies.

To satisfy the prerequisites for certification of a class action, plaintiffs have the burden of showing that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

Once these four prerequisites are met, plaintiffs must further satisfy one of the requirements under Rule 23(b). Plaintiffs assert that their claim is cognizable under Rule 23(b)(2) as it is one in which:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b)(2).

I. *Prerequisite Under Fed.Civ.P. 23(a)*

A. *Numerosity*

Plaintiffs estimate that the proposed class contains well in excess of 15,300 persons. This calculation is based on government statistics, and, although admittedly imprecise, is a reasonable way of gauging the size of the class.[3] Plaintiffs' sources and estimates constitute sufficient evidence that joinder is impracticable. *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978).

The Secretary, however, contends that the proposed class contains an unknown, but potentially substantial, number of individuals over whom this Court has no jurisdiction, and that consequently, plaintiffs have not shown that the class is so numerous that joinder is impracticable. The gist of the jurisdictional challenge is that class members have failed to exhaust their administrative remedies under the Social Security Act.

The jurisdiction of this Court over appeals from Social Security rulings derives from the Social Se-

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[3] The Social Security Administration published statistics on Illinois' share of disabled workers receiving OASDI benefits in 1980. Plaintiffs applied to this figure the percentage of all OAS-DI disability claimants nationally who had benefits denied or terminated because their impairments were considered "not severe." The source for this second number was a report of the U.S. House of Representatives Ways and Means Committee. The resulting figure approximated the number of OASDI recipients in Illinois whose benefits were terminated. Assuming a margin of error as great as 50 percent, the number is still well over 7,000. Furthermore, plaintiffs point out that their estimate is understated because it covers only one year of a three and a half year period, and does not include any of the class members whose claims arose under SSI.

curity Act, 42 U.S.C. §405(g).[4] Section 405(g) permits appeals to federal district courts by those who claimed benefits under Titles II or XVI, but who had such claims denied or terminated by the Secretary. A threshold requirement for an appeal to this Court under § 405(g) is a "final decision of the Secretary made after a hearing."

The U.S. Supreme Court, in a series of decisions, has viewed § 405(g) as containing two components: (1) a claim for benefits must have been filed; and (2) the Secretary must have made a final decision on that claim. *See e.g., Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1975); *Califano v. Yamasaki*, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The first of these requirements is viewed as a *sine qua non* to the exhaustion of a claimant's exhaustion of administrative remedies. The second requirement, however, unlike the first, may be waived under appropriate circumstances. *Id.* 424 U.S. at 330, 96 S.Ct. at 900.

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[4] Plaintiffs also invoke this Court's jurisdiction under 42 U.S.C. § 1383(c)(3). Section 1383(c)(3), which pertains to Title XVI (Supplemental Security Income For Aged, Blind, & Disabled), is the counterpart to § 405(g) (which pertains to Title II (Federal Old-Age, Survivors, & Disability Insurance Benefits). The language of § 1383(c)(3) clearly subjects it to the principles contained in § 405(g). Section 1383(c)(3) reads as follows:

> The final determination of the Secretary after a hearing under paragraph (1 shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title; except that the determination of the Secretary after such hearing as to any fact shall be final and conclusive and not subject to review by any court.

It is the second requirement of § 405(g)—that of a final administrative hearing—that forms the basis for the Secretary's objection to plaintiffs' amended class definition.[5] The Secretary contends that the claims of an unknown, but potentially great number of class members have not yet been finally disposed of in administrative hearings. The Secretary emphatically maintains that she has not waived the final hearing requirement as to these claimants, and as a result, a significant number of proposed class members may not invoke the jurisdiction of this Court. Plaintiffs argue, however, that the Secretary's nonwaiver is not an insurmountable obstacle to this Court's jurisdiction over the affected class members, because under certain conditions, the court itself has

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[5] The Secretary had challenged plaintiffs' class, as *originally* defined, under both prongs of § 405(g). She claimed that not only had many members of the class failed to receive final hearings on their claims, they had never properly filed claims for benefits in the first place. The Secretary relied on a recent opinion by Justice Rehnquist, sitting as Circuit Justice, *Heckler v. Lopez*, —— U.S. ——, 104 S.Ct. 10, 77 L.Ed.2d 1431 (1983) (Rehnquist, Circuit Justice) *petition for rehearing en banc pending*. Justice Rehnquist suggested that, when benefits had been *terminated*, as opposed to initially denied, a claimant's initial application for benefits was not enough to establish a "claim" for purposes of § 405(g). Rather, a claimant must have also filed a claim or application for *continued* benefits. The policy in the Seventh Circuit has been that the initial application for benefits meets the jurisdictional criteria in either case. *See, e.g., Wright v. Califano*, 603 F.2d 666, 668-70 (7th Cir. 1979). In response to the Secretary's argument, plaintiffs amended the definition of their class. This Court holds that the definition, as amended, conforms both to the policy in the Seventh Circuit and the more stringent policy enunciated by Justice Rehnquist. Hence, the Secretary's challenge under the first prong of § 405(g) is rendered moot.

the authority to waive a final administrative hearing under § 405(g).

The Supreme Court and the Courts of Appeals, including the Seventh Circuit, have made it clear that if the Secretary refuses to waive exhaustion, the court should do so under certain conditions. *Mathews v. Eldridge*, 424 U.S. at 328-30, 96 S.Ct. at 899-900; *Giancone v. Schweiker*, 656 F.2d 1238, 1241-43 (7th Cir.1981); *Wright v. Califano*, 587 F.2d 345, 348-50 (7th Cir.1978); *Caswell v. Califano*, 583 F.2. 9, 14 (1st Cir.1978). Under these decisions, judicial waiver of complete administrative exhaustion is appropriate when plaintiffs' legal claims are collateral to the demand for benefits, and plaintiffs' interest in propmpt judicial review is so great that deference to the agency's judgment is inappropriate. *Mathews v. Eldridge*, 424 U.S. at 328-30, 96 S.Ct. at 899-900; *Giancone v. Schweiker*, 656 F.2d at 1243-44; *Wright v. Califano*, 587 F.2d at 349; *Caswell v. Califano*, 583 F.2d at 14-15. Judicial waiver of complete administrative exhaustion is also appropriate when the Secretary's position on the policies being challenged is fixed (i.e., the Secretary cannot change it) or is final (i.e., the Secretary is unlikely to change it). *Liberty Alliance For The Blind v. Califano*, 568 F.2d 333, 345-46 (3rd Cir.1977).

While plaintiffs need meet only one of these tests for judicial review of the exhaustion requirement, in the instant case this Court finds that they meet both. First, plaintiffs challenge the validity of two policies of the Secretary on the basis that they violate the Social Security statute and the Fifth Amendment. The plaintiffs' claims, if successful, will not result in the payment of benefits to class members; rather, the result will be a change in the Secretary's policies and procedures in evaluating a disability claim. As

such, the issue presented is collateral to claims for benefits. Moreover, plaintiffs' interest in prompt judicial review is substantial. All of the class members are applicants for or recipients of disability benefits. These persons are not working, but are on fixed incomes with many of them dependent upon their benefits or public assistance as their sole source of income. An erroneous termination or denial of disability benefits to such persons places substantial financial and nonfinancial burdens on them. "[I]t is simply not true that a claimant for disability benefits, not infrequently in dire financial circumstances due to his disability, is truly made whole by retroactive payments which he has had to survive perhaps well over a year without." *Caswell v. Califano*, 583 F.2d at 14.

Second, because the Secretary's position appears to be final on the challenged policies, exhaustion of administrative remedies would be futile. The experience of the two named plaintiffs, who did exhaust, illustrates the futility of exhaustion—the Secretary's published policies are not likely to be influenced or changed by the administrative appeals of any single individual; thus the issue is unsuited to resolution in the hearing process. *Liberty Alliance For The Blind v. Schweiker*, 568 F.2d at 345-6. That the challenged policies are published both in the federal regulations and in Social Security Rulings further suggests the final nature of the Secretary's position. Finally, the validity of the policies challenged here has been raised in other litigation giving the Secretary ample opportunity to reconsider, and she has not done so. *E.g., Chico v. Heckler*, 710 F.2d 947 (2d Cir.1983); *Scruggs v. Schweiker*, 559 F.Supp. 100 (D.Tenn.1982).

For all the aforementioned reasons, this Court hereby waives the final hearing requirement under § 405(g), and assumes jurisdiction over the unnamed members of plaintiffs' proposed class. Because the class proposed by plaintiffs contains by definition individuals over whom this Court has jurisdiction under § 405(g), the Secretary's challenge to the numerosity of the class must fail.

B. *Common Questions of Law and Fact*

The Secretary also claims that the common question of law raised by plaintiffs is too intertwined with the subordinate factual circumstances of each class members to be separated out for purposes of class certification. The Secretary appears to have misread plaintiffs' complain, however. What plaintiffs are seeking in this Court's ruling on the validity of two administrative policies for determining eligibility for benefits, not an adjudication as to whether individual class members are entitled to benefits thereunder. Hence, the class as defined by plaintiffs meets the legal-factual commonality requirement.

C. *Typicality of Claims*

"The typicality requirement refers to the nature of the representatives' claim or defense and not to specific facts from which it arose or to the relief sought." *Long v. Thornton Tp. High School District 205*, 82 F.R.D. 186, 190 (N.D.Ill.1979). The test is whether the named plaintiffs' claim and that asserted on behalf of the class are "based on the same legal theory." *Id.* at 190. In this case plaintiffs challenge the Secretary's denial of benefits solely because of the application of the regulatory policies at issue here. The legal theory on behalf of the class is identical.

D. *Representativeness of Named Plaintiffs*

"Adequacy of representation depends on two factors: (a) the plaintiffs' attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the class." *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir.1977). In this case, plaintiffs' attorneys have repeatedly been found to be adequate class counsel. *See, e.g., Wright v. Califano*, 587 F.2d 345 (7th Cir. 1978); *Jimenez v. Weinberger*, 523 F.2d 689 (7th Cir.1975). As to the second factor under Fed.R.Civ. P. 23(a)(4), the named plaintiffs have instituted this litigation to declare the Secretary's regulatory policies illegal and to enjoin their application. If the prayed for relief is granted, both the named and unnamed plaintiffs will benefit equally. The Secretary does not allege, nor does this Court find any facts suggesting that plaintiffs' interest in the case is inconsistent with the interests of the class as a whole.

II. *Requisites Under Fed.R.Civ. P. 23(a)*

In addition to meeting the requirements of Fed.R. Civ.P. 23(a), a class action must qualify under one of the subsections of 23(b). The Secretary's regulatory policies challenged here affect equally all members of the class. Indeed, plaintiffs have defined the class by reference to the scope of the Secretary's policies at issue.

Thus, there is ample support for plaintiffs' assertion that the Secretary has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief with respect to the class as a whole appropriate. *Alliance to End*

Repression v. Rochford, 565 F.2d 975, 978 (7th Cir. 1977); *Dixon v. Quern,* 76 F.R.D. 617, 620 (N.D. Ill.1977).

Conclusion

Plaintiffs have met their four-part burden under Fed.R.Civ.P. 23(a) for certification of a class action. The objections raised by defendant to numerosity and commonality of issues have been considered and rejected in the foregoing discussion. The remaining two prerequisites of 23(a), typicality of claims and representativeness of named plaintiffs have also been met. Furthermore, the requirements of Fed.R.Civ.P. 23(b)(2) are satisfied in that the Secretary's two eligibility policies are generally applicable to the proposed class, making appropriate injunctive and declaratory relief with respect to the class as a whole. Therefore, plaintiffs' motion for class certification is granted.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 83 C 4110

EDNA JOHNSON and JEROME MONTGOMERY on their own behalf and on behalf of others similarly situated, PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

Sept. 19, 1984

ORDER

BUA, District Judge.

Plaintiffs in this class action are or have been applicants for or recipients of disability benefits under Title II and/or Title XVI of the Social Security Act (the "Act"). They have been denied benefits on the ground that their disabilities are not severe enough to prevent them from working. They challenge the validity of the applicable regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), 404.1522, 416.922 (1983) and Social Security Ruling ("SSR") 82-55 (cum. ed. 1982), as violative of the Act and the equal protec-

tion component of the Due Process Clause of the Fifth Amendment to the United States Constitution. The defendant is the Secretary of the Department of Health and Human Services ("HHS"), who administers the Old-Age and Survivors Disability Insurance ("OASDI") and Supplemental Security Income ("SSI") programs through the Social Security Administration ("SSA"), and promulgates regulations and rulings interpreting the applicable statute.

Plaintiffs submitted a motion for summary judgment, pursuant to Fed.R.Civ.P. 56, seeking declaratory and injunctive relief. The Secretary submitted a cross-motion for summary judgment. For the reasons stated herein, the plaintiffs' motion for summary judgment is granted and the Secretary's cross-motion is denied.

I. THE CHALLENGED REGULATIONS AND THE ACT

Plaintiffs challenge the above regulations on two grounds: (1) 404.1520(c) and 416.920(c) do not consider vocational factors (age, education, and work experience) and residual functional capacities; and (2) 404.1522, 416.922, and SSR 82-55 do not combine "nonsevere" impairments. Before proceeding to consider the validity of these regulations, an overview of the regulations and the Act is helpful.

The OASDI and SSI programs provide for the payment of benefits to disabled persons. Under both programs, a person is considered disabled if he or she is unable

> to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to

> result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . .

42 U.S.C. §§ 423(d)(1)(A) & 1382c(a)(3)(A).

The Act provides that "for purposes of" applying this definition, an individual

> shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .

42 U.S.C. §§ 423(d)(2)(A) & 1382c(a)(3)(B).

The Secretary is authorized to establish rules and regulations, consistent with the Act governing the determination of disability claims. 42 U.S.C. §§ 405(a) & 1383(d)(1).

Pursuant to this authority, the Secretary established a five-step sequential procedure for determining whether a claimants is disabled. 20 C.F.R. §§ 404.1520, 416.920 (1983). Under the existing regulations, if the claimant is found not to be disabled under any one of the sequential tests, the analysis ends and the remaining steps of the analysis are not completed. *See* §§ 404.1520(a), 416.920(a). As the first step, the Secretary ascertains whether the claimant is working; if so, a finding of "not disabled" follows. In the second step, the Secretary determines, solely on the basis of medical factors, whether the claimant has a "severe" impairment which "significantly limits [his] physical or mental ability to do basic work activities." §§ 404.1520(c), 416.920(c). The regulation specifically provides that at this sec-

ond step the Secretary "will not consider your age, education, and work experience." Plaintiff's first ground relates to this refusal to consider vocational factors in the second step and the resulting possibility that vocational factors will be foreclosed if the inquiry stops after the second step.

If the claimant is determined to have a "severe" impairment under this definition, the Secretary next considers (Step 3) whether the impairment is one which is listed in Appendix 1 of the regulations; if so, the claimant is found to be disabled without requirement of further proof that the impairment prevents him from working. The fourth step comes into play if the claimant's impairment, though deemed "severe" under the second step, is not a "listed" impairment under the third step. In such cases, the Secretary determines (Step 5) whether, considering the claimant's age, education, and work experience, his impairment prevents him from doing any other work available in the national economy. If the claimant cannot, he is found to be disabled and his claim is approved. *See Canon v. Harris*, 651 F.2d 513, 517 (7th Cir.1981).

The Secretary acknowledges that the effect of the sequential procedure is that denials of claims at the second step occur "on the basis of medical considerations alone." SSR 82-56 (cum. ed. 1982). To implement this policy, SSR 82-55 lists 20 impairments which are nonsevere *per se* on the basis of medical evidence alone. SSR 82-55 is binding on all SSA personnel, including administrative law judges and the Appeals Council.

The challenged regulations, 20 C.F.R. §§ 404.1522 and 416.922 (1983) provide: "We will consider the combined effects of unrelated impairments only if all

are severe." In addition to these regulations, SSR 82-55 instructs Social Security administrators not to consider the combined effects of nonsevere impairments because inasmuch "as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs."

II. CHALLENGED REGULATIONS APPLIED TO THE NAMED PLAINTIFFS

The named plaintiffs were found "not disabled" under the severity regulation (the second step of the sequential procedure), and thus were denied benefits on the grounds that the medical evidence alone failed to establish the existence of a "severe" impairment—one which significantly limited their ability to perfrom basic work activities. The application and effect of the challenged regulations is illustrated by the cases of the named plaintiffs.

Plaintiff Edna Johnson was denied SSI disability benefits. Examining the Administrative Record in the light most favorable to the Secretary, "the claimant has the following impairment(s): diabetes, lumbago, anxiety, neurosis and chronic duodenal ulcer." (J. 15). While the Administrative Law Judge ("ALJ") acknowledged and examined each of these impairments, it appears from the record that he held each impairment separately did not significantly limit the ability to perform basic work-related functions (J. 14). The ALJ did not expressly consider the combined effect of her impairments. The ALJ never considered the severity of Johnson's impairments in light of her vocational factors. The ALJ concluded that her claim is being denied on medical considera-

tions alone without consideration of vocational factors. (J. 15). For support, the ALJ cited § 416.920 (c).

Plaintiff Jerome Montgomery was denied continued OASDI disability benefits. Examining the record in the light most favorable to the Secretary, the "claimant has the following impairments: atypical chest pain, hypertension, diabetes mellitus, and status post fractures of the left hip, leg and foot" (M. 10). The Appeals Council ("AC") held each impairment to be nonsevere *per se* according to SSR 82-55 (M. 9). Even though the AC concluded that the claimant's impairments "did not constitute a severe impairment . . . either singly or in combination" (M. 9), the record reveals that the AC held each impairment to be nonsevere without considering the combined effects of the nonsevere impairments. In addition, the AC did not consider the severity of Montgomery's impairments in light of his vocational factors (M. 8).

The plaintiff class, as defined, includes Title II and Title XVI claimants who, like the named plaintiffs, were and are denied benefits as a result of the application of the challenged regulations to them at the second step. *See* Order of December 7, 1983. 100 F.R.D. 70.

III. THE SEVERITY REGULATION

The challenged policies of refusing to consider vocational factors of age, education and work experience, and refusing to combine the effects of nonsevere impairments are embodied in the second step of the sequential procedure. The second step has been called the severity regulation since it determines whether a claimant's impairment is severe so as to con-

tinue to the next steps in the procedure. While the Seventh Circuit Court of Appeals has never addressed the validity of the severity regulation, other Circuit Courts acknowledge the conflict between the severity regulation and the letter of §§ 423(d)(2)(A) & 1382c(a)(3)(B). *Delgado v. Heckler*, 722 F.2d 570, 574 (9th Cir.1983); *Chico v. Schweiker*, 710 F.2d 947, 953 (2d Cir.1983). In *Chico*, Judge Friendly noted:

> the close question of the validity of the 'severity' regulation, involving as it does a seeming conflict between the letter of § 423(d)(2)(A), on the one hand, and, on the other, the Secretary's understandable desire to supply . . . some threshold that a claimant must pass before the Social Security Administration is required either to apply the Appendix 2 guidelines or to call vocational experts. . . .

710 F.2d at 953.

In view of the Secretary's authority under § 405(a) to establish regulations implementing the disability provisions of the Act, our review "is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Heckler v. Campbell*, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed. 2d 66 (1983). However, it is clear that "regulations, in order to be valid must be consistent with the statute under which they are promulgated," *United States v. Larinoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 48 (1977), and the agency's interpretation of the statute cannot supercede the language chosen by Congress." *Monhasco Corp. v. Silver*, 447

U.S. 807, 825, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980).

The starting point for this analysis, as *Chico* points out, is the language of the statutory definition of "disability." 710 F.2d at 593. The statutes, §§ 423 (d)(2)(A) & 1382c(a)(3)(B) speak of an impairment (or impairments) which is "*of such severity that*" the claimant "is not only unable to do his previous work but cannot, considering his age, education and work experience," perform any substantial gainful work.

According to the plaintiffs' interpretation of the statute, vocational factors of age, education and work experience should be considered twice in a disability evaluation. In the second step, these factors are considered along with medical factors to determine the claimant's ability to do his previous work in light of his impairments. In the fifth step, the vocational factors relate to the Secretary's burden to show that the claimant can still perform some type of substantial gainful activity existing in the national economy.

By contrast, the plaintiffs point out that the severity regulation in the second step restricts to medical factors alone the claimant's attempt to establish that his impairment is severe, *i.e.*, that it significantly limits his ability to perform "basic work-related activities." The regulation states that the SSA "will not consider your age, education, and work experience" at the second step. Plaintiffs conclude that the severity regulation is facially inconsistent with the statute's mandate to the Secretary to consider vocational factors of age, education, and work experience and residual functional capacity. *Dixon, et al. v. Heckler*, 589 F.Supp. 1494 (S.D.N.Y.1984); *Smith, et al. v. Heckler*, Civ. No. S-83-1609 (E.D.

Cal. June 6, 1984). *Dixon* and *Smith* are both class action cases in which the courts found the severity regulation to be inconsistent with the statute since it wrongfully precludes a finding as to whether the claimant is able to do his past relevant work or whether, considering vocational factors, claimant can do other work.

The Court disagrees that the statute mandates consideration of vocational factors and residual functional capacity at the second step. However, the severity regulation is invalid since it impermissibly increases the claimant's burden of proof as defined in the statute. *Hundrieser v. Heckler*, 582 F.Supp. 1231 at 1240 (N.D.Ill. 1984).

By substituting "basic work activities" in the second step for "previous work," the severity regulation increases the showing which a claimant must make in order to establish a *prima facie* case of disability. The Secretary in SSR 82-56 acknowledges that an impairment which does not prevent basic work activities may prevent past work. Under the severity regulation, the Secretary states: "When there is no significant limitation in the ability to perform these types of basic work-related functions, an impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past." Thus, while an impairment may not affect basic work activities, it may still prevent the claimant from doing his previous work. *Scruggs v. Schweiker*, 559 F.Supp. 100, 103 (M.D.Tenn.1982). In *Scruggs*, the court confronted the problem of a second step conclusion that an impairment is nonsevere in light of basic work activities, and concluded that:

> . . . this inference in all cases may be unfair. For example, a less than severe hearing loss to an individual may prevent that individual from continuing in his present occupation requiring better hearing than the individual retains. In another example, an individual who has worked at heavy work may be restricted from continuing in heavy lifting by a less than severe muscular strain, or by some other nonsevere muscular strain, or by some other nonsevere health problem.

559 F.Supp. at 103.

In contrast to the severity regulation, the statute plainly states that a claimant need only show that an impairment prevents him from doing his previous work in order to make out a *prima facie* case of disability. This interpretation of the claimant's burden of proof under the statute is well-established. *Jones v. Heckler*, 702 F.2d 616, 620 (5th Cir.1983); *Whitney v. Schweiker*, 695 F.2d 784, 786 (7th Cir.1982); *Kirk v. Secretary of Health and Human Services*, 667 F.2d 524, 529 (6th Cir.1981); *Hall v. Secretary of HEW*, 602 F.2d 1372, 1375 (9th Cir.1979); *Small v. Califano*, 565 F.2d 797, 800 (1st Cir.1977). In *Whitney*, the Seventh Circuit Court of Appeals interpreted the statute to require that the claimant prove "an impairment of sufficient severity . . . which precludes the type of work previously engaged in. . . ." 695 F.2d at 786. Since the severity regulation increases the claimant's burden of proof as defined by claimant's burden of proof as defined by the statute, the regulation is inconsistent with the Act and is therefore beyond the scope of the Secretary's statutory authority. § 405(a) (The Secretary is empowered to promulgate rules "not inconsistent with the pro-

visions of this subchapter, which are necessary and appropriate to carry out such provisions.")

Two recent cases involving individual claims have followed a similar interpretation of the Act to either ignore or narrowly construe the severity regulation. In *Hundrieser v. Heckler, supra,* J. Moran narrowly construed the severity regulation in the same manner as this Court. He concluded that "by making out a *prima facie* case of disability through showing an inability to do past work due to 'an impairment' the claimant necessarily satisfies the severity regulation." 582 F.Supp. 1231 at 1242-1243 (N.D.Ill.1984). J. Moran also noted, as this Court did, that this narrow construction protects "claimants from a statutorily unwarranted increase in the burden of making a *prima facie* case of disability." *Id.*

In *Lucena v. Secretary of Health and Human Services,* 572 F.Supp. 130 (D.P.R.1983), the Court ignored the severity regulation's focus on basic work activities and concluded that the claimant had established a *prima facie* case of disability "where the medical evidence establishes that Plaintiff is unable to perform past work. . . ." 572 F.Supp. at 133. *See Dumas v. Schweiker,* 712 F.2d 1545, 1550 (2d Cir. 1983). The Court recognized, as did this Court, that a *prima facie* severe impairment should be measured against the claimant's ability to do his past work, and not against his ability to do most jobs or basic work activities. Rather, it is the Secretary's burden to rebut the claimant's *prima facie* case by showing his ability to do most jobs or other work in the national economy.

These two cases reaffirm this Court's reading of the statutory definition of severity. However, this Court disagrees with the court in *Hundrieser* that the

conflict between the statutory definition and the severity regulation stems from an overbroad interpretation of the regulation by the Secretary. *Hundrieser, supra* at 25. The conflict stems from the regulation itself and its reference to basic work activities, instead of "previous work" as contained in the statute. Therefore, this Court believes that the plaintiffs have persented a strong case of inconsistency between the Act and the Secretary's severity regulation. *McCoy v. Schweiker*, 683 F.2d 1138, 1143-1144 (8th Cir. 1982) (*en banc*).

IV. THE REFUSAL TO COMBINE NONSEVERE IMPAIRMENTS

Plaintiffs present an even stronger case of inconsistency when they attack the validity of the regulations which refuse to combine the effects of nonsevere impairments. Both regulations, §§ 404.1522 and 416.922, state: "We will consider the combined effects of unrelated impairments only if all are severe and expected to last 12 months." In addition, SSR 82-55 sets forth the dubious logic upon which the regulations rest: "Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions to do most jobs."

The statutory definition of disability refers to "impairment or impairments" which are so severe that they prevent claimant from doing past work or other work in the national economy. This statutory language has been construed to require consideration of the combined effect of all of the claimant's impairments, whether severe or nonsevere. *Bittel v. Richardson*, 441 F.2d 1193, 1195 (3rd Cir. 1971); *Griggs*

v. Schweiker, 545 F.Supp. 475, 477 (S.D.W. Va. 1982); *Rodriguez v. Scvhweiker*, 523 F.Supp. 1240, 1246 (E.D. Pa. 1981). In *Griggs*, the court set forth the proper interpretation of the statute:

> In evaluating effects of various impairments upon a disability benefit claimant, the Secretary may not fragmentize them, but must treat them in combination. *Hicks v. Gardner*, 393 F.2d 299 (4th Cir. 1968). Disability may result from a number of impairments which, taken separately, might not be disabling, but whose total effect, taken together, is to render claimant unable to engage in substantial gainful activity. *Bass v. Celebrezze*, 238 F.Supp. 355 (D.C.S.C. 1965).

545 F.Supp. at 477.

Since this Court finds no Seventh Circuit case on this point, it adopts the plain meaning of the statute as construed in the above cases: the statute requires the Secretary to consider the combined effect of all of the claimant's impairments. Therefore, §§ 404.1522, 416.922, and SSR 82-55 are invalid as beyond the Secretary's statutory authority because they are inconsistent with §§ 423(d)(2)(A) and 1382c(a)(3)(B) of the Act.

V. CONCLUSION

The motion of plaintiff class for summary judgment on the issue of the validity of the challenged regulations is granted. The Secretary's cross-motion for summary judgment is denied. Since it finds that the challenged regulations violate the Act, the Court declines to reach the constitutional issue raised by the plaintiffs since it is not necessary or essential to a decision in the case.

Accordingly, the Court declares that:

(1) defendant's denial of disability claims at the second step of the sequential procedure on the basis of inability to do basic work activities, as opposed to inability to do previous work, and 20 C.F.R. §§ 404-.1520(c) and 416.920(c) (1982), and SSR 82-56, insofar as each establishes and requires this policy, violates 42 U.S.C. §§ 423(d) and 1382c(a)(3)(A), (B), (C);

(2) defendant's policy of refusing to combine nonsevere impairments, and 20 C.F.R. §§ 404.1522, 416.922 (1982) and SSR 82-55 (1982) insofar as each establishes and requires this policy, violates 42 U.S.C. §§ 423(d) and 1382c(a)(3)(A), (B), (C).

This Court enters an injunction enjoining defendants from enforcing 20 C.F.R. §§ 404.1520(a)-.1522 and 416.920(c)-.922 and SSRs 82-55 and 82-56 insofar as they require application of either of the above policies. Injunctive and declaratory relief with respect to the class as a whole is appropriate where, as in this case, the Secretary's policies are generally applicable to the class. *See* Order of December 7, 1983.

The Court also enters preliminary and permanent injunctions requiring defendant:

(1) to hold new disability hearings for class members; and

(2) to reinstate OASDI and/or SSI benefits pending SSA hearing determinations for class members whose benefits had been terminated as a result of the defendant's policies determined unlawfully by this Court and for whom new disability hearings are to be held; and

(3) grant retroactive benefits to class members who, after a new hearing, are found to be disabled.

In addition, pursuant to 42 U.S.C. § 405(g), the Court reverses the Secretary's decision in the cases of Edna Johnson and Jerome Montgomery and remands them for determination of their entitlement to disability benefits without application of the challenged policies.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 4110

Honorable Nicholas J. Bua, Presiding

EDNA JOHNSON and JEROME MONTGOMERY, on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

ORDER

Before the Court are defendant's motions to alter or amend the Court's order dated September 19, 1984, pursuant to Fed. R. Civ. P. 59, and to stay the order pending disposition of defendant's Rule 59 motion pursuant to Rule 62. For the reasons stated herein, defendant's motion to alter or amend is denied and its motion to stay is denied for mootness.

I. DISCUSSION

In support of its motion to alter or amend the Court's order dated September 19, 1984, defendant sets forth four grounds: (1) not all members of the plaintiff class sought appropriate review of their dis-

ability claims within 60 days of the Secretary's final decision pursuant to 42 U.S.C. § 405(g); (2) not all members of the plaintiff class obtained a final decision from the Secretary and therefore failed to exhaust their administrative remedies; (3) recent Congressional action and case law require reconsideration of the September 19, 1984 order and affirmance of the regulations' validity; and (4) recent Congressional action prevents the Court's order from being applied retroactively on the issue of the combined effect of nonsevere impairments.

A motion for reconsideration serves only to correct manifest errors of law or fact or to present newly discovered evidence. *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665 (N.D. Ill. 1982). Therefore, a motion for reconsideration should not serve as an occasion to tender new legal theories for the first time. *Id.* at 666.

1. *The 60-Day Requirement*

Defendant argues that the 60-day provision of Section 205(g) of the Act, 42 U.S.C. § 405(g), and regulations governing the timeliness of administrative appeal, are an absolute time-bar to claims where claimants (i) did not seek administrative review of the initial administrative determination by the state agency that they were not disabled and thereafter permitted more than 60 days to elapse without taking any further action; (ii) did seek reconsideration or an ALJ hearing, but did not pursue the matter further and permitted more than 60 days to elapse without taking any further action, or (iii) exhausted their administrative remedies more than 60 days before this class action was filed but did not seek judicial review pursuant to 42 U.S.C. § 405(g).

Plaintiff argues that the 60-day requirement is a statute of limitations, not a jurisdictional bar, and therefore the requirement is waived unless raised as an affirmative defense. Plaintiff concludes that defendant has waived any objection to the 60-day requirement since the Secretary raises it here for the first time. Since the first two arguments under the 60-day requirement hinge on the question of exhaustion of administrative remedies, which will be discussed later, the Court will analyze only the third argument under the 60-day requirement.

Under the Social Security Act, claimants must seek judicial review of final decisions of the Secretary "within sixty days after the mailing . . . of notice of such decision or within such further time as the Secretary may allow." 42 U.S.C. § 405(g) (1982). While the Supreme Court's position on whether the 60-day provision is jurisdictional is not free from doubt, the Court finds that the analysis in *City of New York v. Heckler*, 742 F.2d 729 (2d Cir. 1984) is persuasive. In *City of New York*, the Second Circuit Court of Appeals examined the Supreme Court cases dealing with the 60-day provision. In the stay ruling in *Heckler v. Lopez*, 104 S.Ct. 221, 222-223 (1984)[1] (Stevens, J., with whom Blackmun, J., joins,

[1] The Supreme Court recently vacated Justice Rehnquist's imposition of a stay in this case. *Heckler v. Lopez*, 84-115, 53 LW 3427 (December 11, 1984). In doing so, the Court affirmed the preliminary injunction issued by the district court and affirmed in part and reversed in part by the Ninth Circuit Court of Appeals. *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984). The Court held that the 60-day limitation is not jurisdictional, but, rather, is like a time limitation for initiation of claims under Title VII of the 1964 Civil Rights Act, which the Supreme Court has held is subject to waiver and equitable tolling.

concurring in part and dissenting in part), Justice Stevens reckoned with the issue and concluded that the 60-day requirement is jurisdictional. Although the Secretary apparently had failed to raise the 60-day requirement in the District Court, Justice Stevens declined to find waiver and concurred in maintaining the stay of the Ninth Circuit's judgment insofar as the stay applied to claimants who had not sought administrative or judicial review of their termination decisions 60 days prior to the filing of the complaint.

In contrast to Justice Stevens' opinion in *Heckler v. Lopez, supra*, in two other cases the Supreme Court has concluded that the 60-day limitation is not jurisdictional. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Weinberger v. Salfi*, 422 U.S. 749 (1975). Both *Salfi* and *Eldridge* construed the 60-day requirement as a statute of limitations, waivable by the parties. *See Mathews v. Eldridge, supra*, 424 U.S. at 328 n.9; *Weinberger v. Salfi, supra*, 422 U.S. at 763-64. Notwithstanding his opinion in *Lopez*, Justice Stevens' separate opinion in *Heckler v. Ringer*, 104 S.Ct. 2013, 2028, 2033-36, incorporates the *Salfi* and *Eldridge* statements to the effect that section 405(g) contains a "statute of limitations" waivable by the parties. Justices Brennan and Marshall also view the 60-day requirement as waivable, *Heckler v. Lopez, supra*, 104 S.Ct. at 225, 226.

In addition to the Second Circuit, other Courts of Appeals have adopted the view that the 60-day limitation period is not jurisdictional. *Lopez v. Heckler*, 725 F.2d 1489, 1508 (9th Cir. 1984); *Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983). Finally, the Second Circuit concluded that Justice Stevens' opinion in *Lopez* did not outweigh the majority opinions in *Salfi* and *Eld-*

ridge: "In the absence of an authoritative ruling by the Supreme Court to the contrary, we continue to believe that the 60-day requirement is not jurisdictional," *City of New York v. Heckler, supra,* 742 F.2d at 738.

In the present case, the issue is whether the Secretary made a timely assertion of the 60-day provision as a defense. If the Secretary did not timely assert the defense under either Fed. Rules Civ. P. 8(c) and 12(h)(1), the 60-day provision need not be considered here. *Mathews v. Eldridge, supra,* 424 U.S. at 328 n.9; *Weinberger v. Salfi, supra,* 422 U.S. at 763-764. The Secretary argues that she made a timely assertion of the 60-day provision as a defense in both her answer to the plaintiffs' amended complaint and her memorandum in opposition to class certification.

After examining both documents, the Court finds that the Secretary did not sufficiently raise the 60-day provision as a defense in order to preserve it. In her answer to plaintiffs' amended complaint, the Secretary merely stated that "plaintiffs have not met the prerequisites to certify this suit as a class action." In her memorandum in opposition to class certification, the Secretary focused only on the alleged failure of all members of the plaintiff class to exhaust their administrative remedies, *i.e.*, obtain a final decision from the Secretary. The Secretary does not discuss the 60-day provision as barring untimely appeals from final decisions. Therefore, since the Secretary did not sufficiently raise the 60-day provision as a defense, it is waived and need not be considered here.

2. *Exhaustion of Remedies*

Defendant contends that the plaintiff class contains members who have not exhausted their admin-

istrative remedies and therefore have not met the threshold requirement of a "final decision" under 42 U.S.C. § 405(g) for an appeal to this Court. The Secretary argues that she has not waived the exhaustion requirement and neither can the Court do so. Plaintiffs counter that it is proper for the Court to waive the exhaustion requirement where, as here, plaintiffs' claims are collateral to the demand for benefits and their interest in prompt judicial review is so great that deference to the agency's judgment is inappropriate.

The Supreme Court has viewed § 405(g) as containing two components: (1) a claim for benefits must have been filed; and (2) the Secretary must have made a final decision on that claim. *Mathews v. Eldridge, supra*, 424 U.S. at 328; *see Califano v. Yamasaki*, 422 U.S. 682 (1979). The first requirement, the filing of a disability claim, is nonwaivable. *Id.* Unlike the first, the second requirement may be waived under appropriate circumstances. *Id.* at 330.

The Supreme Court and the Courts of Appeals, including the Seventh Circuit, have made it clear that if the Secretary refuses to waive exhaustion, the court should do so under certain conditions. *Mathews v. Eldridge, supra*, 424 U.S. at 328-30; *Giancone v. Schweiker*, 656 F.2d 1238, 1241-43 (7th Cir. 1981); *Wright v. Califano*, 587 F.2d 345, 348-50 (7th Cir. 1978); *Caswell v. Califano*, 583 F.2d 9, 14 (1st Cir. 1978). Under these decisions, judicial waiver of complete administrative exhaustion is appropriate when (1) plaintiffs' legal claims are collateral to the demand for benefits, and (2) plaintiffs' interest in prompt judicial review is so great that deference to the agency's judgment is inappropriate. *Mathews v. Eldridge, supra*, 424 U.S. at 328-30; *Giancone v.*

Schweiker, supra, 656 F.2d at 1243-44; *Wright v. Califano, supra,* 587 F.2d at 349; *Caswell v. Califano,* 583 F.2d at 14-15. Judicial waiver of complete administrative exhaustion is also appropriate when the Secretary's position on the policies being challenged is fixed (i.e., the Secretary cannot change it) or is final (i.e., the Secretary is unlikely to change it). *Liberty Alliance For The Blind v. Califano,* 568 F.2d 333, 345-46 (3d Cir. 1977). The above analysis parallels exactly this Court's opinion certifying the plaintiff class. *Johnson v. Heckler,* 100 F.R.D. 70, 73 (N.D. Ill. 1983). The Secretary urges reconsideration of the original class certification in light of the recent Supreme Court opinion in *Heckler v. Ringer,* 104 S.Ct. 2013 (1984).

In *Ringer,* Justice Rehnquist writing for the Court examined the plaintiffs' claims to determine whether they were collateral to a demand for benefits. In his analysis, Justice Rehnquist discussed the separation of the particular claims in "substantive" and "procedural" elements and ultimately rejected that separation regarding those claims. *Id.* at 2021. Under the separation analysis, a procedural claim is wholly collateral to a claim for benefits and therefore administrative exhaustion is not required. A substantive claim is not collateral to a claim for benefits and therefore exhaustion is required. When a claim appears to be both substantive and procedural, the test is whether the procedural claims are "inextricably intertwined" with the claims for benefits.

Within the particular context of a claim asserted under the Medicare Act, Justice Rehnquist concluded that the plaintiffs' claims were inextricably intertwined with their claims for benefits and therefore not collateral to them. *Id.* He found that the relief

which plaintiffs sought to redress their "procedural" objections is the invalidation of the Secretary's current policy *and* a "substantive" declaration from her that the expenses of BCBR surgery are reimbursible under the Medicare Act. *Id.* In further explaining his finding that the procedural claims for injunctive and declaratory relief were inextricably intertwined with substantive claims for benefits, Justice Rehnquist observed: "Following the declaration which respondents seek from the Secretary—that BCBR surgery is a covered service—only essentially ministerial details will remain before respondents would receive reimbursement," *id.* at 2022.

In the present case, the Secretary argues that *Ringer* compels a finding that claims of the plaintiff class, based on declaratory and injunctive relief, are inextricably intertwined with claims for benefits. According to *Ringer*, she reasons that where, as here, the plaintiffs seek to invalidate the Secretary's current policy, their claims are not collateral to claims for benefits and therefore they must exhaust the administrative remedies. Since some members of the plaintiff class did not exhaust their administrative remedies, the Secretary concludes that the class is impermissibly broad and should be narrowed.

The Court disagrees with the Secretary's broad interpretation of *Ringer*. Throughout his opinion, Justice Rehnquist referred to the "particular" claims involved. In doing so, he emphasized that the determination of declaratory and injunctive relief on this issue under the Medicare Act would leave the Secretary no alternative but to grant the plaintiffs' reimbursement claims. The Court's narrow interpretation of *Ringer* is reinforced by Justice Rehnquist's reference to "only essentially ministerial details" re-

maining after the relief sought if it were granted. *Id.* at 2022.

In the present case, notwithstanding the plaintiffs' attempt to invalidate the Secretary's current policy, the Court finds that more than "ministerial details" remain before members of the plaintiff class will receive benefits. The Court's order which invalidated two of the Secretary's regulations required her to hold new disability hearings in order to apply the correct standard for disability as defined by the Court. *Johnson v. Heckler*, 593 F.Supp. 375, 381-82 (N.D. Ill. 1984). Since some members of the plaintiff class may not be awarded disability benefits after the new hearings, an award of benefits is by no means automatic or ministerial. *Johnson v. Heckler, supra,* 100 F.R.D. at 74. Therefore, the Court concludes that plaintiffs' claims are collateral to claims for benefits. *Id.*

Since the Secretary does not challenge the Court's order certifying the class on any other factors, i.e., plaintiffs' substantial interest in prompt judicial review, *id.* the Court holds that administrative exhaustion is not required and the plaintiff class will not be narrowed.

3. *The Severity Regulation*

The Secretary argues that recent Congressional action and case law require reconsideration of the September 19, 1984 order and affirmance of the severity regulation's validity. More specifically, she argues that the Conference Report accompanying the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, explicitly endorses her sequential evaluation process and the concept of severity. H. Rep. No. 1039, 98th Cong. (Printed at

130 Cong. Record 9827, September 19, 1984). In addition, she contends that recent case law underscores the conclusion that a claimant may be denied benefits on a medical determination of nonseverity alone, without consideration of age, education, and vocational factors. Plaintiffs counter that the Secretary's severity regulation exceeds an acceptable *de minimis* threshold test, even though they concede the validity of the severity concept.

The Court finds nothing in the Secretary's two arguments to persuade it to reconsider its previous order invalidating step two of the sequential process. First, the Conference Report's general endorsement of the sequential evaluation process does not affect the Court's narrow ruling that the substitution of "basic work activities" under the regulation for "previous work" under the statute impermissibly increases the claimant's burden of proof. The Court invalidated neither the sequential evaluation process nor the severity concept. The Court essentially agreed with the plaintiffs that the second step of the sequential process exceeds a *de minimis* threshold severity test and is therefore outside of the proper scope of the Secretary's authority.

Second, the case law cited by the Secretary does not affect the previous ruling since the Court explicitly rejected the plaintiffs' assertion that vocational factors had to be considered at the second step. *Johnson v. Heckler, supra,* 593 F.Supp. at 379.

4. *Combined Effect of Nonsevere Impairments*

The Secretary argues that recent Congressional action prevents the Court's previous order from being applied retroactively on the issue of the combined effect of nonsevere impairments. More specifically,

she argues that the 1984 amendment of the Social Security Act which specifically refers to a combination of nonsevere impairments makes a change from the pre-1984 law and therefore the new policy should not be applied retroactively since Congress did not so provide. Plaintiffs counter that the amendment is a clarification of, not a change from, the pre-1984 law and as such the amendment is proof of the propriety of this Court's interpretation of the statute as it existed prior to the amendment.

The issue is whether the 1984 amendment is a change from the old law or a clarification of it. First, the Conference Report specifically states that the pre-1984 statute did not prohibit considering the combined effect of nonsevere impairments: "There is no statutory provision concerning the consideration of the combined effects of a number of different impairments." 130 Cong. Record 9829 (September 19, 1984). In addition, the Report refers to the Secretary's regulations and the "current policies" to describe the Secretary's practice of refusing to combine nonsevere impairments. Therefore, the Court interprets the Report to refer to the Secretary's policy as being incorrect rather than the statute itself prohibiting the combined effect of nonsevere impairments. This observation suggests that Congress intended to correct the Secretary's policy by clarifying the statute rather than to change a contrary policy mandated by the old law.

Second, the Court is convinced that Congress intended a clarification, rather than a change, since the 1984 amendment makes the statute consistent with the Court's interpretation of the statute, *Johnson v. Heckler, supra,* 593 F.Supp. at 381. Where, as here, subsequent legislation reflects an interpreta-

tion of the earlier act, the Amendment is entitled to great weight in determining the meaning of the earlier statute. *Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982). Therefore, the Court holds that its September 19, 1984 order may be applied retroactively to members of the plaintiff class.

II. CONCLUSION

Defendant's motion to alter or amend the Court's order dated September 19, 1984 is denied. Defendant's motion to stay the order pending the outcome of the above motion is denied for mootness.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
NICHOLAS J. BUA
Judge,
United States District Court

Dated: December 17, 1984

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Nicholas J. Bua

Cause No. 83 C 4110 Date December 17, 1984

Title of Cause JOHNSON *v.* HECKLER

Brief Statement of Motion Plaintiffs' Motion for Further Relief

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

ORDER

Plaintiffs' motion for further relief pursuant to 28 U.S.C. § 2202 is denied. The Secretary's reasons for holding up new disability determinations until her motion to alter or amend had been decided are sufficient. The determination regarding the size and scope of the plaintiff class was important to the Secretary's compliance with the Court's order dated September 19, 1984. However, since that determination has been made in the Court's order issued today on the Secretary's motion to alter or amend, the plaintiffs may make a subsequent motion for further relief if they feel that the Secretary has not complied with the Court's order dated September 19, 1984 after this date.

/s/ Nicholas J. Bua

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 4110

Honorable Nicholas J. Bua, Presiding

EDNA JOHNSON and JEROME MONTGOMERY, on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

ORDER

Before the Court is defendant's motion for a stay of judgment of this Court's order dated September 19, 1984, pursuant to Rule 62 of the Federal Rules of Civil Procedure, pending an appeal to the Seventh Circuit Court of Appeals. Also before the Court is plaintiffs' motion for a finding of civil contempt and sanctions and for further relief pursuant to 28 U.S.C. § 2202. For the reasons stated herein, plaintiffs' motion for a finding of civil contempt and sanctions is denied. Plaintiffs' motion for further relief is granted insofar as the Court clarifies the injunctive relief ordered in its September 19, 1984 order.

Finally, defendant's motion for a stay of the injunctive relief pending appeal is denied.

I. FACTS

On September 19, 1984, this Court entered an order granting summary judgment in favor of the plaintiff class and enjoining the defendant Secretary of Health and Human Services ("the Secretary") from applying the severity regulations and rulings insofar as they mandate (1) consideration at the second stage of the sequential evaluation process of a claimant's ability to do "basic work activities" as opposed to "previous work," and (2) consideration of the combined effects of unrelated impairments only if they are severe and expected to last 12 months. *Johnson v. Heckler*, 593 F.Supp. 375, 381-82 (N.D. Ill. 1984). In addition, the order provided preliminary and permanent injunctive relief requiring the Secretary to:

(1) hold new disability hearings for class members;

(2) reinstate disability benefits under Title II and/or XVI of the Social Security Act pending hearing determination by the Social Security Administration (SSA) for class members whose benefits had been terminated as a result of the policies described above; and

(3) grant retroactive benefits to class members who, after a new hearing, are found to be disabled.

On October 1, 1984, pursuant to Fed. R. Civ. P. 59, the Secretary timely filed a Motion to Alter or Amend judgment. On October 12, 1984, pursuant to Fed. R.

Civ. P. 62, the Secretary filed a Motion to Stay Judgment Pending Disposition of the Motion to Alter or Amend Judgment. In the interim, on October 10, 1984, the Social Security Administration (SSA) issued an instruction by teletype to all SSA components to "immediately stop processing denials/cessation on claims for residents of Illinois based on a finding of 'nonsevere impairment' without consideration of vocational factors and residual functional capacity." Emergency Instruction IT-239-89 (October 10, 1984). The October 10 teletype further instructed "all components within the State of Illinois . . . [to] immediately stop issuing determinations/decisions on cases that would be denied/ceased on the basis of a 'nonsevere' impairment(s)," and to hold such cases pending further instructions.

On December 17, 1984, this Court entered an order denying defendant's motion to alter or amend the September 19, 1984 order. On the same date, the Court entered an order denying without prejudice the plaintiff class' motion for further relief and invited it to refile the motion if the Secretary did not comply with the September 19, 1984 order after December 17, 1984. A notice of appeal from the Decemmber 17, 1984 denial of defendant's motion to alter or amend was filed on February 15, 1985.

II. DISCUSSION

The issue presented is whether the Court should grant a stay of its order imposing a permanent injunction on the Secretary and the SSA to refrain from applying the incorrect standard in determining whether a severe impairment exists, as well as the other injunctive relief ordered. *Johnson v. Heckler*,

supra, 593 F.Supp. at 381-82. Rule 62(c) of the Federal Rules of Civil Procedure provides:

> When an appeal is taken from an interlocutory or final judgment granting . . . an injunction, the court, in its discretion may suspend [or] modify . . . an injunction during the pendency of the appeal . . . .

Once an injunction has been granted, the party seeking the stay must show (1) that he is likely to prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties would not be substantially harmed by the stay, and (4) that a stay would be in the public interest. *Decker v. U.S. Dept. of Labor*, 485 F.Supp. 837, 844 (D.C. Dis.), *aff'd* and *remanded*, 661 F.2d 598 (7th Cir. 1980); *see also Adams v. Walker*, 488 F.2d 1064, 1066 (7th Cir. 1973); *Collin v. O'Malley*, 452 F.Supp. 577 (N.D. Ill. 1978). In short, the Court must consider the relative hardships to the parties arising out of the relief sought, in light of the probable outcome of the appeal. *Indianapolis Colts v. Mayor & City Council of Baltimore*, 733 F.2d 484, 486 (7th Cir. 1984).

1. *Likelihood of Success on Appeal*

For the most part, defendant Secretary has restated her arguments in opposition to the September 19, 1984 order which she previously presented in her motion to alter or amend. The Secretary reiterates her three grounds on which she is likely to prevail on appeal and attempts to bolster them with new cases and recent legislation. Plaintiff class argues that the Secretary's repetition of arguments from her previously-denied motion to alter or amend under-

scores the weakness of her position and the unlikelihood of her prevailing on appeal.

The first ground set forth by the Secretary is the jurisdictional bar of the claimant's failure to exhaust his administrative remedies. In its order dated December 17, 1984, this Court recognized this requirement and the circumstances under which it could find a waiver of the exhaustion of administrative remedies. Once again, as she did in her motion to alter or amend, the Secretary asserts that her reading of *Heckler v. Ringer*, 104 S.Ct. 2013 (1984) is the proper one and therefore that she will prevail on this issue on appeal.

The Court rejects the Secretary's broad interpretation of *Ringer* in favor of the narrow interpretation contained in its order dated December 17, 1984. *Johnson v. Heckler*, No. 83 C 4110, slip op. at 8 (N.D. Ill. December 17, 1984). The Court carefully analyzed the language of *Ringer* and applied the "inextricably intertwined" standard set forth therein to determine whether this case was a proper one for waiver of exhaustion of administrative remedies Pursuant to *Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976), the Court held the waiver of complete administrative exhaustion was proper because plaintiff class' legal claims are collateral to a claim for benefits and the class interest in prompt judicial review is so great that deference to the Secretary's judgment is inappropriate.

In holding that the claims of plaintiff class are collateral to a claim for benefits, the Court followed Justice Rehnquist's majority opinion and applied his test for "inextricably intertwined" claims, which would not be collateral to a claim for benefits. In support of its holding, the Court reasoned:

> . . . The Court's narrow interpretation of *Ringer* is reinforced by Justice Rehnquist's reference to "only essentially ministerial details" remaining after the relief sought if it were granted. *Id.* at 1022.
>
> In the present case, notwithstanding the plaintiffs' attempt to invalidate the Secretary's current policy, the Court finds that more than "ministerial details" remain before members of the plaintiff class will receive benefits. The Court's order which invalidated two of the Secretary's regulations required her to hold new disability hearings in order to apply the correct standard for disability as defined by the Court. *Johnson v. Heckler,* 593 F.Supp. 375, 381-82 (N.D. Ill. 1984). Since some members of the plaintiff class may not be awarded disability benefits after the new hearings, an award of benefits is by no means automatic or ministerial. *Johnson v. Heckler, supra,* 100 F.R.D. at 74. Therefore, the Court concludes that plaintiffs' claims are collateral to claims for benefits. *Id.*

Johnson v. Heckler, supra, slip op. at 8.

The Secretary cites no new authority to persuade the court to accept her broad interpretation of *Ringer.* However, this court has found a recent case from the Eighth Circuit Court of Appeals to support its narrow interpretation of *Ringer. Polaski v. Heckler,* 751 F.2d 943 (8th Cir. 1984). *Polaski* is a class action challenging the Secretary's nonacquiescence in Eighth Circuit decisions with respect to the proper standard for evaluating pain and other subjective complaints, and with respect to the proper standard for terminating disability benefits. The district court enjoined

the Secretary from denying or terminating disability benefits unless she followed the Eighth Circuit decisions regarding those standards. The district court also provided for reconsideration of the claims of persons within the class under the designated standards. *Id.* at 944-45.

In holding that waiver of complete administrative exhaustion was proper, the *Polaski* court said:

> Finally, the plaintiffs' claims are admittedly not "wholly collateral" to their claims for benefits, as was true in *Eldridge*. But the focus of their relief as a class—the Secretary's compliance with our case law and the 1984 Act—is substantially collateral to the issue of whether they are in fact disabled and entitled to benefits. *See City of New York v. Heckler*, 742 F.2d at 736-37; *Mental Health Association of Minnesota v. Heckler*, 720 F.2d at 971.

Id. at 953.

The reasoning in *Polaski* parallels this Court's reasoning in its order dated December 17, 1984, and its order entered certifying the plaintiff class. *See Johnson v. Heckler*, 100 F.R.D. 70, 74 (N.D. Ill. 1983). Therefore, the Court finds that the Secretary is not likely to prevail on appeal on the issue of exhaustion of administrative remedies.

On the second ground, the Secretary asserts that the 60-day provision of 42 U.S.C. § 405(g) is an absolute jurisdictional time bar to claimants who received a final decision from the Secretary and did not seek judicial review more than 60 days prior to the filing of this class action. Once again, the Secretary presents no new arguments or authority to support her contention that the 60-day provision is not waiv-

able. Her conclusions rests on statements made in Supreme Court opinions (not heard by the full Court) involving Justice Rehnquists's entering of a stay in *Heckler v. Lopez*, 104 S.Ct. 10 (1983) (Rehnquist, Circuit Justice), *motion to vacate stay denied*, 104 S.Ct. (1983), *partial stay pending cert. granted*, 104 S.Ct. 2164 (1984), *vacated and remanded*, 105 S.Ct. 583-84 (1984). The Secretary also relies upon an opinion by Justice Stevens, joined by Justice Blackmun, dissenting in part from the denial of an emergency application to vacate the stay entered by Justice Rehnquist. 104 S.Ct. at 222.

In its order dated December 17, 1984, this Court rejected the Secretary's argument that the 60-day provision is jurisdictional and instead followed the majority view that the 60-day provision is a statute of limitations, which is waived if not asserted as an affirmative defense. *Johnson v. Heckler, supra*, slip op. at 4; *see also Mathews v. Eldridge*, 424 U.S. 319, 328 n.9; *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975). The Court now notes that the Secretary raised the 60-day provision for the first time in her motion to alter or amend the September 19, 1984 order. The Secretary has not attempted to refute the argument and conclusion in *City of New York v. Heckler*, 742 F.2d 729 (2d Cir. 1984). In *City of New York*. the Second Circuit court of Appeals specifically addressed the problem of resolving the opinions of Justices Rehnquist and Stevens in *Heckler v. Lopez, supra*, with the Supreme Court's pronouncements in *Mathews v. Eldridge, supra*, and *Weinberger v. Salfi, supra*. The Second Circuit concluded: "In the absence of an authoritative ruling by the Supreme Court to the contrary, we continue to believe that the 60-day requirement is not jurisdic-

tional," *City of New York v. Heckler, supra*, 742 F.2d at 738. Since it continues to be persuaded by the Second Circuit's resolution of this issue, the Court finds that the Secretary is not likely to prevail on appeal on the issue of the 60-day provision.

On the third ground, the Secretary asserts that passage of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, explicitly endorses her sequential evaluation process and the concept of severity. In addition, she argues that the case law since the Act has narrowly construed the severity regulation, the second step of the sequential evaluation, as a *de minimis* threshold test, which is exactly the extent of this Court's order dated September 19, 1984.

The strength of the Secretary's argument lies in her unnecessarily broad reading of the Court's September 19, 1984 order. In that order, the Court held the second step invalid *insofar* as it required a claimant to prove an inability to perform "basic work activities" as opposed to "previous work" as called for in the statute. *Johnson v. Heckler, supra*, 593 F.Supp. at 380, 381. The Court expressly rejected plaintiff class' argument that vocational factors must be considered at the second step, *id.* at 379, contrary to the Secretary's interpretation that this Court requires consideration of vocational factors at the second step. Emergency Instruction IT-239-89, page 3 (October 10, 1984). In fact, the Secretary's more recent instruction reflects the proper interpretation on this Court's order. Her instruction issued on January 23, 1985 refers to "ability to perform past relevant work." Emergency Instruction IT-23.t25 (January 23, 1985).

The case law which reads the severity regulation as a *de minimis* threshold test is entirely consistent

with this court's order. The only reason that the court held the severity regulation invalid as applied and as written is the nature of the relief required in this class action, as opposed to individual claimant cases (the *de minimis* cases). In addition, a narrow interpretation of the severity regulation as a *de minimis* test would not be as forceful a signal or as binding a precedent on the SSA when it holds hearings to apply to correct standard of severity. *Id.* at 381. Therefore, since it finds no authority cited by the Secretary to be inconsistent with its September 19, 1984 order, the Court finds that the Secretary is not likely to prevail on appeal on the issue of the validity of the severity regulation as applied and as written.

2. *Balance of Hardship and Public Interest*

The Secretary argues that the relief ordered will not only impose a substantial cost on the general fisc and Social Security Trust Fund but also substantially divert scarce resources now being devoted to attempting to administer the SSA. Irreparable harm to the public fisc will result because the cost of effectuating the relief ordered will not be recoverable once it is implemented on behalf of the class as it is now defined. In addition, the payment of benefits to class members pursuant to the reopening and readjudication of claims under the standards ordered by the Court will not be recoverable if the class is subsequently limited upon review by the Court of Appeals. The Secretary also argues that the harm to the plaintiffs is not irreparable because any member entitled to benefits will be recompensed with full back benefits for any period in which he or she were later

found to be disabled, as well as for any period during which a stay may operate.

The plaintiff class argues that the harm to plaintiffs is clearly irreparable because, for some class members, Social Security disability benefits are necessary for food, shelter, and medical treatment. Deprivation of or delay in receiving disability benefits can cause medical setbacks, hospitalizations, and even death. The plaintiff class concludes that no later lump sum payment can redress these forms of deprivation. In addition, the plaintiff class challenges the amount of harm which the Secretary claims will result from the relief ordered. Finally, plaintiff class concludes that the public interest lies in a swift remedy to the Secretary's noncompliance with the proper legal standards.

If it has a poor chance of prevailing on appeal, the party seeking a stay must show that it would be hurt substantially more by the injunction than the other party would be hurt by a stay of the injunction pending appeal. *Indiaanpolis Colts v. Mayor & City Council of Baltimore, supra,* 733 F.2d at 486. Like other courts which have considered this issue, this Court must find that the balance of hardships strongly favors the plaintiff class. *Holden v. Heckler,* 584 F.Supp. 463, 492 (N.D. Ohio 1984). In *Holden,* the court reached the same conclusion in similar circumstances and reasoned as follows:

> The severe harm suffered by the plaintiff class . . . encompassed economic hardship, physical and emotional suffering, and perhaps even death. Protection of the integrity of the public fisc is important . . . . But budgetary factors are not more important than protecting the rights to which the class members are entitled . . . .

Id.

In addition, where the Secretary's possible injury arises out of her own regulations and conduct, she should not be granted a stay to minimize any potential harm. *Mandel v. U.S. Dept. of Health, Ed. & Welfare*, 417 F.Supp. 57, 59 (D. Md. 1976). The Court also notes that the use of denial access codes should facilitate the location of class members and therefore the Secretary's alleged costs for locating the class may be exaggerated. *Smith v. Heckler*, No. S-83-1609, slip op. at 8 (E.D. Cal. January 17, 1985).

Finally, the Secretary argues that potential damage to the public fisc, which represents harm to the government's interest, corresponds to harm to the public interest. In other words, the Secretary argues that a cautious approach in enacting the relief ordered, in the form of a stay, is in the public interest. The Court disagrees with the Secretary's conclusion for two reasons. First, it is difficult to fathom any public interest in the Secretary's holding of claims to be adjudicated under a standard, which the Court has assessed twice before and here for a third time as being improperly written and applied. Since the public obviously includes future claimants for disability benefits, the Court concludes that it is not in the public interest to stay adjudication of claims under the proper standard. Second, the public interest requires that the Secretary recognize and apply the correct rule of law. *Holden v. Heckler, supra*, 584 F.Supp. at 493. Therefore, the Court finds that the public interest would not be served by a stay pending appeal.

III. CLARIFICATION OF INJUNCTIVE RELIEF

In light of the Secretary's Emergency Instruction IT-23.t25 (January 23, 1985), the Court does not find sufficient grounds for holding the Secretary in

civil contempt and therefore the motion of the plaintiff class for a civil contempt finding is denied. However, the Court grants the motion of the plaintiff class for further relief under 28 U.S.C. § 2202 insofar as it clarifies the relief contained in its September 19, 1984 order. Furthermore, it is apparent to the Court that detailed instructions on how the defendant should comply with this Court's September 19, 1984 order are warranted. The further relief granted is as follows:

IT IS HEREBY ORDERED that defendant, her agents and employees:

1. Shall immediately commence identification of all class members for whom preliminary relief has been awarded, *i.e.*, class members whose claims were filed or pending as of February 26, 1979, the date on which the challenged regulations became effective, or thereafter. Defendants shall complete identification of those class members whose benefits were denied at the initial or reconsideration levels of review within thirty days of the date of this order. Defendant shall complete identification of the remaining members of the class awarded relief within seventy-five days of the date of this order. Nothing in this paragraph or the paragraphs which follow shall be construed as requiring the readjudication of individuals who have received an administrative determination or decision after February 26, 1979, which was conducted in accordance with this Court's previous order; and

2. Are directed to redetermine (reopening if necessary) without regard to the enjoined regulations and rulings the applications or claims of class members who received unfavorable administrative decisions on or after February 26, 1979. Such redeter-

minations are to be made in the manner (and subject to the options) described in sections (a) through (d) below. No class member shall be excluded from the class because they have commenced court preceedings.

(a) With respect to class members whose applications for disability benefits have been denied at the initial administrative stage or on reconsideration and who have not requested review by an administrative law judge, whether or not the time for appealing such denial has now passed.

(i) Defendant shall forward the class member's case file to the Disability Determination Services (DDS) for a new initial determination within three days of receipt of the claims folder by the District Office with jurisdiction over the claim. Defendant shall make best efforts to deliver to the District Office 50% of the claims files within two weeks, 65% of the claims files within three weeks and 80% of the claims files within thirty days after the class member responds to notification by the Secretary. Defendant shall begin reconstructing the files of all class members whose claims files are not received by the appropriate District Office within four months after the class member responds to notification.

(ii) Defendant shall make all good faith efforts to complete the sequential evaluation of disability within four weeks

of the date a class members' case file is received by the DDS, unless the class member submits new medical evidence, requests a full redevelopment of evidence and reevaluation of disability, or defendant determines that full redevelopment is required; provided that, in the event the DDS receives more than three thousand cases in any one week, those cases in excess of three thousand shall be considered, for purposes of this subparagraph, as received in the following week. Nothing in this order shall preclude defendant from employing the quality assurance review procedures set forth in 42 U.S.C. 421(c)(3) in each individual class member's case to the extent defendant deems appropriate.

(b) In conducting the redetermination of those applications or claims in which a request for a hearing was or is pending, defendant shall conduct a hearing before an administrative law judge unless a determination of entitlement can be made on the basis of the record. Such hearings shall be scheduled within thirty days of the date the Secretary identifies the class member, or determines that a person who has presented him/herself as a potential class member is, in fact, a class member. Defendant shall make all good faith efforts to hold hearings within seventy-five days of the date of that identification or determination.

(c) Class members whose hearings have already been held, whether or not the time for ap-

pealing the decision has not passed, shall have the option of having a rehearing of proceeding with Appeals Council review, unless a determination of entitlement can be made on the basis of the record. Such rehearing shall be scheduled within thirty days of the date the Secretary identified the class member. Defendant shall make all good faith efforts to hold hearings within seventy-five days of the date of identification or determination of class membership for class members with cases pending before the Appeals Council. Nothing in this provision should be construed to require that hearings be held in cases that were previously adjudicated in accordance with the injunctive relief as ordered by the court.

(d) Class members who received unfavorable Appeals Council decisions, whether or not the time for requesting judicial review has now lapsed, shall have the option of an Appeals Council review conducted in accordance with *Johnson* criteria. If such review is requested, such review shall be undertaken within thirty days from the date it is requested.

(e) Class members who have actions pending in federal court may elect to have their cases remanded to the Secretary for a reevaluation. If such an election is made, the Secretary shall move the Court for or otherwise agree to a remand of the case. For class members who have had cases remanded from Federal Court, defendant shall make all

good faith efforts to hold hearings within seventy-five days of the date that defendant receives a copy of the remand order or within eighty-five days of the date the remand order is entered, whichever is earlier; and

3. Shall immediately issue instructions to Social Security Offices in the State of Illinois, to the Office of Hearings and Appeals, to the Appeals Council, and to the State Disability Determination Services requiring compliance with paragraph (1).

4. Shall, within one week of entry of this order, issue instructions for compliance with this order including procedures to be used in identifying class members, for re-evalauting initial claims of plaintiff class members who have been denied at the initial administrative stage or on reconsideration; and

5. Shall immediately provide plaintiffs' attorneys with copies of all memoranda, notices, instructions, directives and like documents issued to effect compliance with this order as those documents are issued; and

6. Shall report to plaintiffs' counsel every four weeks with:

(a) a list of the names and social security numbers of class members who have been identified; and

(b) the number of class members identified; and

(c) the number of cases ordered forwarded to DDS's and

(d) the number of cases that have been scheduled for hearings, and the number of hearings that have been conducted; and

(e) the number of redterminations of applications that result in allowances, the number that result in denials, and the number of redeterminations of termination cases that result in allowances and the number that result in terminations; and

7. The Secretary may petition the Court at any time for relief from any one or more of the provisions of paragraph 6 above. Such relief shall be granted upon a showing made by the Secretary and a determination of the Court that the implementation of this order is proceeding smoothly and that the information called for in the particular provision or provisions from which the Secretary seeks relief is no longer needed or upon a showing and a determination of the Court that such relief is otherwise appropriate; and

8. Nothing in this order shall be construed as precluding members of the plaintiff class from obtaining greater relief on alternative grounds. Class members shall retain all rights to administrative and judicial review of decisions made as a consequence of this order. Nothing in this order shall be construed as precluding class members who choose to proceed with their individual court cases from seeking preliminary relief in those cases.

/s/ Nicholas J. Bua
NICHOLAS J. BUA
Judge,
United States District Court

Dated: March 15, 1985

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLLINOIS
EASTERN DIVISION

No. 83 C 4110

Judge Nicholas J. Bua

EDNA JOHNSON and JEROME MONTGOMERY, on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

—vs—

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

AGREED SUPPLEMENTAL ORDER

On March 15, 1985, this Court entered an Order herein that, *inter alia*, granted plaintiffs' motion for further relief. On March 22, 1985, defendant, by her counsel, and in open court, represented to the Court that she and counsel for plaintiffs had reached certain agreements respecting compliance with that Order, and the September 19, 1984 Order herein, including particularly the time within which defendant must complete identification of class members pursuant to the March 15th Order. Counsel for plaintiffs made similar representations. Pursuant to those representations, and the March 15, 1985 and September 19,

1984 Orders, IT IS ORDERED, ADJUDGED AND DECREED that:

1. The second sentence of par. 1 of the injunction included in the March 15th Order (slip opinion at 11-12) is amended to read: "Defendants shall complete identification of those class members whose benefits were denied at the initial or reconsideration levels of review by May 16, 1985."

2. In "reinstating OASDI and/or SSI benefits pending SSA hearing determinations for class members whose benefits had been terminated as a result of the defendant's policies determined unlawful by this Court . . ." as required by the September 19th Order, defendant shall reinstate such benefits effective with the month of September, 1984.

3. Defendant shall be entitled to verify that a claimant for benefits under the March 15, 1985 and September 19, 1984 Orders is a member of the plaintiff class and meets all the non-disability related eligibility criteria (under Title II and/or Title XVI of the Social Security Act) for payment of such benefits; provided, however, that plaintiffs' counsel shall be notified of any decision denying such benefits on any ground promptly after that decision is made. (The notification shall include the name, address, SSA number of the claimant denied benefits, and a statement of the reason(s) why (s)he has been denied.)

4. Defendant shall ensure that any SSA notices related to this case that SSA plans to send or give to plaintiff class members, shall be received by plaintiffs' counsel at least 10 days prior to the date SSA plans to send or give them to the class members. Provision of these notices to plaintiffs' counsel is intended to afford them the opportunity to comment upon such notices.

AGREED AS TO FORM AND CONTENT:

LINDA WAWZENSKI, ESQ.
Assistant U.S. Attorney
Civil Division
219 South Dearborn Street
Chicago, Illinois 60604
For Defendant

/s/ Robert E. Lehrer
ROBERT E. LEHRER, ESQ.
Legal Assisatnct Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
For Plaintiffs

ENTER:

NICHOLAS J. BUA
United States District Court Judge

APPENDIX J

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 223(d)(1)(A) and (2)(A) of the Social Security Act, as codified at 42 U.S.C. 423(d)(1)(A) and (2)(A), provides:

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activitity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

(2) For purposes of paragraph (1)(A)—

(A) an individual (except a widow, surviving divorced wife, or widower for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in

the region where such individual lives or in several regions of the country.

2. Section 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(A) and (B), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

3. Section 223(d)(2)(C) of the Social Security Act, as added by Section 4(a)(1) of the Social Security Disability Benefit Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800, provides:

"(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

4. Section 1614(a)(3)(G) of the Social Security Act, as added by Section 4(b) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800, provides:

"(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.".

5. 20 C.F.R. 404.1520 and 404.1521 provide:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will

determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a deci-

sion based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any othew work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, co-workers and usual work situations; and

(6) Dealing with changes in a routine work setting.

6. 20 C.F.R. 416.920 and 416.921 provide:

§ 416.920 Evaluation of disability in general.

(a) *Steps in evalauting disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 416.962).

[50 FR 8728, Mar. 5, 1985]

§ 416.921 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Bacis work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1442

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents.

RESPONDENTS' MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Responderts, pursuant to Sup. Ct. R. 46.1, and for the reasons stated herein and in the attached affidavits, move for leave to proceed in forma pauperis before this Court. Respondents are a class of applicants for and recipients of disability benefits under Title II and/or Title XVI of the Social Security Act, 42 U.S.C. §§ 401 et seq. (Title II), §§ 1381 et seq. (Title XVI). See 42 U.S.C. §§ 1382, 1382f and 50 Fed. Reg. 45558 (October 31, 1985) (Restricting payment of Title XVI benefits for individuals without an eligible spouse to persons whose countable income is at a rate of not more than $4032 for calendar year 1986).

The named respondents are Edna Johnson, a Title XVI applicant and recipient, and Jerome Montgomery, a Title II applicant and recipient. Their financial circumstances fairly represent the financial circumstances of class members generally.

Named respondents Johnson and Montgomery both sought leave to proceed in forma pauperis before the United States District Court for the Northern District of Illinois.

Ms. Johnson's motion was granted on June 22, 1983; Mr. Montgomery's motion was denied on August 15, 1983.

Respectfully submitted,

Robert E. Lehrer

One of the Attorneys for Respondents

JOSEPH A. ANTOLIN
JOHN M. BOUMAN
SHELLFY DAVIS
ROBERT E. LEHRER (Counsel of Record)
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NO. 85-1441

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al..
Respondents

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, EDNA JOHNSON, being first duly sworn, depose and say that I am one of the named plaintiffs and class representatives in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petition For A Writ of Certiorari are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month you received.

November, 1967
$170/mo.

2. Have you received with the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

SSI -- $336/mo.

3. Do you own any cash or checking or savings acount?

No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Edna Johnson
EDNA JOHNSON

SUBSCRIBED and SWORN to before me this 14th day of April, 1986.

Bennye Clay
NOTARY PUBLIC

NO. 85-1441

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, JEROME MONTGOMERY, being first duly sworn, depose and say that I am one of the named plaintiffs and class representatives in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petition For A Writ of Certiorari are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month you received.
   April, 1976
   $1200/mo.

2. Have you received with the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments interest, dividends, or other source?
Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
Social Security $705/mo.
Private Pension $83.83/mo

3. Do you own any cash or checking or savings acount?
No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

Family home at 6912 S. Union St., Chicago -- $56,000
1985 Ford Escort -- $6,000

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Elaine Montgomery (wife); Lawrence Montgomery (son)
I pay about $300/mo. in utilities, $60 for real estate taxes and insurance, $200 on the car note, and $30 for life and health insurance in addition to necessary living expenses.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Jerome Montgomery
JEROME MONTGOMERY

SUBSCRIBED and SWORN to before me this 14th day of April, 1986.

Bennye Clay
NOTARY PUBLIC

NO. 85-1442

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOSEPH A. ANTOLIN
JOHN M. BOUMAN
SHELLEY DAVIS
ROBERT E. LEHRER (Counsel of Record)
Legal Assistance Foundation
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343 South Dearborn Street
Chicago, Illinois 60604
Phone: 312/341-1070

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether the district court properly exercised jurisdiction in this class action under 42 U.S.C. § 405(g) (1982), over the claims of those class members who did not fully exhaust their administrative remedies, or obtain a final decision of the Secretary of Health and Human Services within 60 days prior to the filing of the complaint?

2. Whether the court of appeals correctly held that, while the Secretary could lawfully retain a de minimis "severity" step, the existing "severity" regulations and rulings violated the Social Security Act because they resulted in the denial of claims at a threshold level without an individualized assessment of whether claimants could meet their prima facie burden of proving disability?

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NO. 85-1442

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

- vs -

EDNA JOHNSON, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents agree with petitioner that the petition for writ of certiorari should be held pending the rulings in Bowen v. City of New York, No. 84-1923 (argued February 26, 1986) and Bowen v. Owens, No. 84-1905 (argued February 26, 1986), but only as to the first question presented. They respectfully request that this Court deny the petition as to the second question presented.

OPINIONS BELOW

The following opinions are reported, in addition to those cited by the Secretary: the December 17, 1984 order of the district court denying the Secretary's motion to alter or amend

the judgment (Pet. App. 65a-76a) */ is reported at 607 F. Supp. 875 (N.D. Ill. 1984); the March 15, 1985 order of the district court denying the Secretary s motion for a stay pending appeal, denying plaintiffs' motion for contempt, and awarding plaintiffs certain additional relief (Pet. App. 78a-95a), is reported at 604 F. Supp. 1070 (N.D. Ill. 1985).

STATEMENT

Respondents brought this class action on behalf of Illinois residents, to challenge the regulations and rulings governing step two of the sequential evaluation process for determining disability claims under the Social Security Act (the "Act"). They claimed that under these step two regulations and rulings, the Secretary of Health and Human Services ("Secretary") violated the Act: (1) by adopting more than a de minimis threshold severity standard, that increased the claimants' statutorily defined prima facie burden of proof and denied them individualized assessments of their claims; and (2) by refusing to consider the combined effect of non-severe impairments.

1. Titles II and XVI of the Act require the payment of disability benefits to any otherwise eligible claimant who meets the statutory definition of disability set forth in 42 U.S.C. §§ 423(d)(1)(A) (1982) and 423(d)(2)(A) (Supp. I 1983), and 1382c (a)(3)(A) and (B)(1) (1982). All twelve courts of appeals have interpreted the Act to provide that if a claimant demonstrates that he has a physical or mental impairment(s) that prevents him

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*/ Citations to the lower court rulings are to the Appendix to the Petition for Certiorari ("Pet. App."). Citations to the Appendix hereto are designated "Resp. Br. App. ____." Respondents also cite to the numbered items in the Record ("R.")in the court of appeals, which is still lodged in that court.

from performing his past work, he meets his prima facie burden of proving disability. (See Pet. App. 15a-16a (citing cases)).

2. In February, 1979, the Secretary established a five-part sequential evaluation process for determining disability claims. 43 Fed. Reg. 55349 (1978)(now codified at 20 C.F.R. §§ 404.1520 and 416.920 (1985)). If the claimant is found not to be disabled at any one of the sequential steps, the analysis is terminated and the claim is denied. See 20 C.F.R. §§ 404.1520 (a) and 416.920(a). At step two, a claimant must demonstrate by medical evidence alone that his impairment is "severe" or his claim will be denied. 20 C.F.R. §§ 404.1520(c) and 416.920(c). No claims are approved at step two. Id.

3. Effective August 20, 1980, the Secretary promulgated two Social Security Rulings ("SSR") interpreting the step two regulations. */ SSR 82-56 stated that an impairment may be con-considered non-severe regardless of whether it prevents the claimant from doing his past work. (Resp. Br. App. 8a). SSR 82-55 (rescinded April, 1985) set forth a list of 20 impairments that were automatically to be held non-severe regardless of whether they prevented the claimant's performance of his past work. (Resp. Br. App. 8a).

4. Effective August 20, 1980, the regulations governing disability determinations were further amended to provide that at step two the Secretary would "consider the combined effects of unrelated impairments only if all were [independently] severe." 45 Fed. Reg. 5574 (1980) (codified at 20 C.F.R. §§ 404.1522 and 416.922) (1982)).

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*/ Like regulations published in C.F.R., SSR's are binding on all Social Security Administration personnel, including state agency adjudicators, Administrative Law Judges ("ALJ"), and the Appeals Council. 20 C.F.R. § 422.408 (1985).

5. Neither the 1979 nor the 1980 regulatory revisions were preceded or accompanied by any relevant amendment to the Act's definition of "disability."

6. During the three fiscal years after the 1979 and 1980 regulations and rulings became effective, the percentage of all Title II benefit denials and terminations occurring at the second step were 39.0% (FY 1980), 45.2% (FY 1981), and 40.3% (FY 1982). House Committee on Ways and Means, WMCP-2, 98th Cong., 1st Sess. Backgound Material and Data on Major Programs at 11 (1983) (R.15, Exh. B). This represented a significant increase in the number of comparable denials and terminations from the three fiscal years preceding the regulatory revisions: 10.8% (FY 1976), 29.8% (FY 1977), and 31 8% (FY 1978). (Id.).

7. On August 11, 1983, respondents, Edna Johnson and Jerome Montgomery, filed an amended class complaint challenging the Secretary's step two "severity" policies insofar as they: (a) increased the claimants' prima facie burden of proof; and (b) failed to consider the combined impact of non-severe impairments. (Pet. App. 1a-2a). They invoked the court's jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c)(3)(1982). (Pet. App. 8a-13a).

(a) Edna Johnson applied for Title XVI benefits on March 24, 1982 at age 54. (Id. at 5a). At that time, she suffered from diabetes mellitus, lumbago, a duodenal ulcer, Schazski's ring of the esophagus and anxiety neurosis. (Id.). Because of her multiple impairments, she had been hospitalized five times since 1970. (Id.).

Ms. Johnson has a tenth grade education. (Id.). Her only past work experience was as a nurse's aide (id.), where she was required to lift patients weighing over 100 pounds. The job of nurse's aide requires medium exertional capacities. (Id.); U.S. Department of Labor, Dictionary of Occupational Titles, 4th

Ed., and Selected Characteristics (1981) ("DOT"); see 20 C.F.R. § 416.967(c) (1985) (defining medium work). Johnson presented unrebutted evidence that she retained the capacity despite her impairments (i.e., residual functional capacity) to perform no more than sedentary work. (Pet. App. at 5a); see 20 C.F.R. § 416.967(a) (1985). Consequently, she did not retain the residual functional capacity (i.e. medium) to perform her past work. (Pet. App. 5a); cf. Secretary's Memorandum of Law in Support of Summary Judgment at 4 n.3 (R. 46) (Agreeing that Johnson cannot do medium work).

After Johnson's application was denied both initially and upon reconsideration at the second step, she appeared before an ALJ. (Pet. App. 5a). The ALJ considered each of her impairments in turn and ruled that each one, taken separately, was not severe. (Id.). Accordingly, he denied the claim; the Appeals Council affirmed. (Id.).

(b) Jerome Montgomery has a sixth grade education. (Id. at 6a). He worked for 28 years as a butcher, cutter and boner in a meat packing plant until illness forced him to stop working. (Id.). In 1976, the Secretary awarded him Title II disability benefits due to his diabetes and heart disease. (Id. at 5a-6a).

On January 8, 1982, the Secretary informed Montgomery that as of October, 1981 he was no longer considered to be disabled. (Id at 6a). Montgomery then appealed his termination of benefits to an ALJ. At the hearing, he presented unrebutted evidence that he suffered from hypertension, ischemic heart disease with angina pectoris, diabetes, mild obesity, degenerative osteoarthritis of the spine, and the effects of fractures at the hip, leg and foot. (Id.).

Montgomery's past jobs required "heavy" exertional capa-

city, although a butcher's job could also be classified as "medium." (Id.); DOT; see, 20 C.F.R. § 404.1567(c) and (d) (1985) (defining medium and heavy work). The uncontroverted evidence of record shows that Montgomery retained the residual functional capacity to perform no more than sedentary work due to his combined impairments. (Pet App. 6a). See 20 C.F.R. § 404.1567(a) (1985). Consequently, he did not retain the residual functional capacity (i.e., heavy or medium) to perform his past work. (Pet. App. 6a); cf. Secretary's Memorandum of Law in Support of Summary Judgment at 31-32 (R. 46) (Not challenging contention that Montgomery could do no more than sedentary work).

The ALJ reversed the termination decision and ruled that Montgomery continued to be disabled. (Pet. App. 6a). On its own motion, the Appeals Council reversed the ALJ's decision and reinstated the previous termination decision. (Id.). It held that hypertension, heart disease, diabetes and osteoarthritis were each per se non-severe under SSR 82-55. (Id. at 6a); see ¶ 3, supra. Because the same ruling prohibited consideration of the combined effect of all non-severe impairments to determine severity, Montgomery was held to be not disabled. (Pet. App 6a).

8. On December 7, 1983, the United States District Court for the Northern District of Illinois certified a plaintiff class. The court refused to exclude from the class those claimants who had not fully exhausted their administrative remedies. (Id. at 42a-47a).

9. On September 19, 1984, the district court granted summary judgment to respondents and invalidated the Secretary's step two policies as violative of the Act insofar as they: (a) impermissibly increased the claimants' statutorily defined prima facie burden of proof; and (b) failed to consider the combined effect of non-severe impairments. (Id. at 55a-62a). In its

subsequent orders dated December 17, 1984, and March 15, 1985, the court emphasized the "narrow" scope of its September 19th ruling. (Id. at 74a).

(a) The district court stated that its rulings "invalidated neither the sequential evaluation process nor the severity concept" and did not preclude a "severity" determination based on medical factors alone. (Id. at 74a). It stated that the Secretary was not required to fully consider age, education or work experience at the second step. (Id.) (citing Johnson, at Pet. App. 58a). The court only invalidated a threshold step two test to the extent that it exceeded the claimants' statutorily defined prima facie burden of demonstrating an inability to do past work. (Id.).

(b) The district court also emphasized that its decision permitted the Secretary to impose a de minimis threshold standard under which claimants might be denied benefits at step two on the basis of medical factors if they suffered from only a slight impairment that could not be disabling, regardless of their age, education and work experience. (Id. at 86a-87a).

10. On July 30, 1985, the court of appeals affirmed the district court's rulings. (Id. at 27a). In reviewing the statutory requirements for obtaining disability benefits, the court observed that "all twelve circuits have unanimously held that ... the plaintiff makes a prima facie showing when he demonstrates an impairment which prevents him from performing his previous work." (Id. at 15a). The court then noted that a de minimis step two standard "determin[ing] that a person is not disabled ... based on a judgment that the person has no impairment, or that the impairment or combination of impairments are slight enough to warrant a presumption that the person's work ability is not seriously affected" would conform with the Act's

requirements. (Pet App. at 19a, quoting H.R. Rep. No. 98-618. 98th Cong., 2d Sess. 7-8 (1984), reprinted in 1984 U.S. Code, Cong. & Ad. News 3038, 3044-45; see Pet. App. 17a-22a). The court accepted respondents' argument that the challenged regulations and rulings "do not permit a 'de minimus' reading." (Id. at 18a, 17a-22a). Rather, the Secretary unlawfully denied claims at the second step without an individualized assessment of the effect of a claimant's impairment(s) and regardless of whether a claimant had met his prima facie burden of showing an inability to do his past work. (Id. at 16a-22a). Therefore, the court invalidated the challenged regulations and rulings. (Id. at 21a-22a). In addition, the court affirmed the district court's ruling that the "plain language" of the statute required the Secretary to consider the combined effect of non-severe impairments. (Id. at 22a-26a).

11. On September 9, 1985, the Secretary submitted a petition for rehearing with a suggestion for rehearing in banc. In support of the petition on September 17, 1985, the Secretary submitted a draft unpublished version of a new SSR (later denominated after revisions as SSR 85-28, Resp. Br. App. 1a-6a) which was to become effective upon publication. The draft ruling stated that it was being issued to "reflect certain circuit court decisions that have taken issue with the Secretary's previously stated definition of 'not severe' impairments." (Resp. Br. App. 1a). The ruling cited with approval Baeder v. Heckler, 768 F.2d 547 (3d Cir. 1985), explaining that the "severity regulation" was meant "to do no 'more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working.'" (Id. at 3a, quoting Baeder, 768 F.2d at 553).

12. The Secretary's petition for rehearing was denied by an equally divided court on October 28, 1985. Neither the court's order denying the petition, nor Judge Easterbrook's opinion dissenting from the denial, referred to the new SSR.

13. On November 15, 1985, the Secretary published SSR 85-28, which differed in some respects from the draft which had been submitted to the court of appeals. The SSR states that an "impairment or combination of impairments is found 'not severe' ... at [the second] step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered ..." (Id. at 4a) (emphasis added). The SSR also stated that "[g]reat care should be exercised in applying the not severe impairments concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step." (Id. at 5a).

14. The Secretary has never submitted the published version of SSR 85-28 to the trial court or court of appeals here.

REASONS WHY THE PETITION SHOULD BE HELD IN PART, AND DENIED IN PART

I. INTRODUCTION

The Secretary acknowledges that neither of the questions

he presents merits plenary review. */ He urges instead that "the petition be disposed of as appropriate in light of the Court's rulings in ... other cases": Bowen v. City of New York, No. 84-1923 (argued Feb. 26, 1986) ("City of New York"), Bowen v. Owens, No. 84-1905 (argued Feb. 26, 1986) ("Owens") and Bowen v. Yuckert, petition for cert. pending, No. 85-1409 (filed February 21, 1986) ("Yuckert"). City of New York and Owens present similar 42 U.S.C. § 405(g) (1982) ("Section 405(g)") questions to the ones raised here; Yuckert assertedly presents the same severity step question.

Respondents agree with the Secretary that the petition is appropriately held and disposed of as to the Section 405(g) question, in light of the Court's rulings in City of New York and Owens. See § II, infra. Respondents submit, however, that certiorari should be denied as to the severity step question, regardless of the disposition of the Yuckert petition. See § III, infra.

II. THE SECTION 405(g) QUESTIONS ARE PROPERLY DISPOSED OF AS APPROPRIATE IN LIGHT OF THE COURT'S RULINGS IN CITY OF NEW YORK AND OWENS

The Secretary correctly states that the Section 405(g) questions presented in City of New York and Owens and the Section 405(g) questions presented by the court of appeals ruling here are "closely related." (Pet. at 12). Consequently, it would be appropriate to hold the petition here with respect to the

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*/ Respondents refer to the first question the Secretary presents as the "Section 405(g) question." See Petition at (I) (question "1"). They refer to the second question he presents as the "severity step question." See id. at (I) (question "2").

Section 405 (g) questions, pending the Court's rulings in City of New York and Owens. See generally R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 5.9 (1986).

III. CERTIORARI SHOULD BE DENIED AS TO THE SEVERITY STEP QUESTION

A. Certiorari Should Be Denied Here Because Certiorari Should Be Denied In Yuckert

The Secretary concedes that if certiorari is denied in Yuckert, it should also be denied as to the severity step question here. (Pet. at 12-14). Certiorari should be denied in Yuckert. for substantially the reasons stated in the brief in opposition to certiorari to be submitted in that case and for the reasons stated here.

Respondents sharply disagree with the Secretary's interpretation of Yuckert. He reads Yuckert to "require the decision maker to consider the vocational factors of age, education and work experience" at step two of the sequential evaluation process and, therefore, to prohibit the Secretary from employing any threshold "severity step" at all. (Yuckert Pet. at 19; id. at 8-11, 18-19). But Yuckert neither requires that to which the Secretary objects, nor prohibits that which the Secretary favors.

As the Yuckert court correctly noted the Act requires the Secretary to consider "both medical and vocational factors" in making the ultimate determination of disability. Yuckert, 774 F.2d 1365, 1368, 1369-70(9th Cir. 1985). It invalidated the Secretary's severity regulations because they resulted in denials of benefits to claimants based on medical factors alone, even where consideration of vocational factors could have dictated a different result. Id. But, as the Secretary recognizes, under a

de minimis step two standard, claims would be denied at step two only where the impairments are so slight that no set of vocational factors could ever make a difference in the ultimate disability determination. (Yuckert Pet. 23-24); see (Pet. App. 17a-18a); Statement, at ¶ 9(b), supra. In this sense (as the Secretary himself explains) a de minimis step two test is not "divorced from vocational considerations." (Yuckert Pet. at 23). Since the then-existing severity regulations were entirely "divorced from vocational considerations" -- i.e., they permitted summary denials of claims even when such considerations could make a difference in the ultimate determination of disability -- the Yuckert court concluded that these provisions "conflict with the language of the statute that requires the Secretary, in determining disability, to consider [vocational] factors." Yuckert, 774 F.2d at 1369.

In short, the Yuckert court's reference to the required consideration of vocational factors, id. at 1370, is not a reference to the consideration of such factors at the second step, as the Secretary suggests (Yuckert Pet. at 8-11, 18-19). Rather, it explains why a step two test that could preclude eligible claimants from proving disability by reference to vocational factors (at a later step) is not valid. For the same reason, Yuckert's invalidation of the then-existing severity regulations does not prohibit the Secretary from implementing a de minimis severity step of the type he apparently now seeks to employ -- for such a step has no such preclusive effect. See (Yuckert Pet. at 23-24) (describing de minimis step as one under which only claimants who "would be found not to be disabled at subsequent steps of the subsequential evaluation process in any event" would be denied benefits); SSR 85-28 (Resp. Br. App. 3a)

(same); see also (Pet. App. 27a-18a). */

If this Court agrees with respondents' interpretation of Yuckert, then that ruling does not present the issue for which the Secretary now seeks plenary review. Such a reading, in short, eviscerates the basic predicate of the Yuckert petition -- and with it the rationale for granting certiorari as to the severity step question here.

B. Even If Certiorari Is Granted In Yuckert, It Should Be Denied Here

The Secretary's position is that, if certiorari in Yuckert is granted, the petition here should be held pending the Yuckert decision next term and then be disposed of in light of that ruling. (Pet. at 12-13).**/ This plea is grounded on the conclusory assertion that the severity step issue in the two cases is the same. (Pet. at 13). But a party cannot secure a "hold" of a certiorari petition by a mere assertion of identity or similarity. Rather, there must be a substantive and relevant identity between the questions in the two petitions such that the court of appeals decision below might be changed in light of a plenary decision in Yuckert. This required showing is modest,

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*/ Yuckert also found the step two regulation violative of the Act because it "does not permit the individualized assessment of disability required by the Act," and because it "improperly denies benefits to a claimant who has made a prima facie showing of disability." Yuckert, 774 F. 2d at 1370. These infirmities do not infect every possible threshold severity step. A de minimis step two would suffer from neither of the defects the Yuckert court identified. (Pet. App. 17a-22a). See Statement at ¶ 9-10.

**/ In § III. A., supra, respondents showed that the Secetary's reading of Yuckert was not correct. In § III.B., however, respondents assume arguendo that the Secretary's erroneous reading of Yuckert is accepted and that certiorari will be granted in that case.

but it is not -- and cannot be -- made here.

The Secretary's sole quarrel with Yuckert is that it assertedly disapproved of any threshold severity step, including a de minimis step. (Yuckert Pet. at 7-11, 19-24). He seeks plenary review of that decision to obtain this Court's agreement that the Act authorizes "a preliminary screening of claimants at step 2 of the sequential evaluation process in order to determine whether their impairments are sufficiently minimal to render it unnecessary for the state agency or the ALJ to undertake a full vocational evaluation of the claimant, including a specific consideration of his age, education and work experience." (Id. at 23; see id. at 18, 23-24). Such a ruling from this Court would be entirely consistent with the decision below.

The Johnson court affirmed, without modification, district court rulings that unambiguously allow the Secretary to adopt a de minimis threshold severity test under which a claimant might be denied benefits on the basis of medical factors alone, without full consideration of "past work" or "age, education and work experience." (Pet. App. 22a, 27a, affirming: Pet. App. 78a, 86a ("[R]ead[ing] severity regulation as a de minimis threshold test is entirely consistent with this Court's order." "Vocational factors [need] not ... be considered at the second step."); Pet. App. 65a, 74a ("[T]he Court invalidated neither the sequential evaluation process nor the severity concept."); and Pet. App. 50a, 55a-61a). The court of appeals also explained that a de minimis step two standard that disqualifies claimants when their impairments are so slight that no additional evidence respecting age, education and work experience could establish their eligibility, would square with the Act's requirements.

(Pet. App. 17a-22a). */ Thus, even if the Secretary achieved the result he seeks in Yuckert, the court of appeals decision here would remain unaffected. It follows that there is no reason to hold this petition pending a Yuckert decision.

Moreover, it is the Secretary's own view that the decision to which he objects in Yuckert is far different from the ruling below. He expressly acknowledges that the Johnson court did not require the Secretary to fully consider a "claimant's age, education and work experience in every case" and invalidated the severity step regulations "only to the extent that they do not provide for the claimant to establish a prima facie case by showing an inability to perform his prior work." (Pet. at 13; see Pet. App. 16a-20a).**/ He recognizes, in short, that what he objects to in Yuckert is not part of the ruling below.

C. The Court Of Appeals Ruling Is Apparently Consistent With The Secretary's New Severity Step Policy, Does Not Conflict With Other Appellate Decisions In A Manner Warranting Plenary Review, And Is Clearly Correct

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*/ The court of appeals' limited ruling adopted the narrow argument respondents advanced there. They urged that the statutory infirmity infecting the Secretary's step two regulations and rulings was that they permitted a claimant to be denied benefits at step two even though he was able to meet his prima facie burden of proof at a later step of the sequential evaluation process under an individualized assessment of the factors made relevant by the Act. See § II.B.2, infra. (Pet. App.16a-17a). Respondents never resisted a de minimis step two threshold severity test. (Id.). On the contrary, they stressed that a de minimis step two severity test would be valid. (Id.).

**/ In dissenting from the denial of the petition for rehearing in banc, Judge Easterbrook "assume[d]" that the "panel's decision . . bar[s] the use of any step two hurdle ...." (Pet. App. 34a). That assumption was in error. The court of appeals permitted a de minimis "step two hurdle," as the Secretary concedes by his description of the Johnson ruling quoted in the text.

The petition should also not be held because the ruling below is apparently consistent with the Secretary's description of his new written policies, does not conflict with decisions of the other appellate courts in a manner that would warrant holding the petition, and correctly interprets the Act.

1. By promulgating SSR 85-28, the Secretary has sharply changed his policy and appears to have eliminated any dispute with the decision below. The Secretary vigorously defended a threshold severity step that was not a de minimis step, and that distorted the well-established statutory allocation of the burdens of proof. E.g., Pet. App. 18a-22a; Baeder v. Heckler, 768 F.2d 547, 551 (3d Cir. 1985); Stone v. Heckler, 752 F.2d 1099, 1103 (5th Cir. 1985); Brady v. Heckler, 724 F.2d 914, 920 (11th Cir. 1984). After the denial of the rehearing petition, however, the Secretary -- without judicial coercion -- published SSR 85-28, in which he announced that he had "reevaluat[ed]" the step two test, and was now "clarify[ing]" it so that it was "consistent with various court decisions," including specifically Baeder and Stone. SSR 85-28 (Resp. Br. App. 3a). This "clarification" in fact was a significant policy change, and it also caused a change in litigation position here. The SSR 85-28 step two test, as described by the Secretary (Yuckert Pet. at 20 n.13, 21-24) is substantially the same as the de minimis test set forth in Brady and endorsed by the court of appeals here. Compare SSR 85-28 (Resp. Br. App. 4a) with Brady, 724 F.2d at 920 and (Pet. App. 17a-22a). */ In short, what the court of appeals found

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*/ A de minimis threshold severity test respects the statutory allocation of the burden of proof because, by definition, it

Footnote continued on next page.

found that the Secretary might lawfully do at step two, is apparently what he now has done. Thus, the petition should be denied because there is no reason to review a court decision invalidating step two policies the Secretary has now abandoned.

2. There is no conflict among the court of appeals decisions that warrants holding the petition here (or granting certiorari in Yuckert). Every one of the relevant decisions (including all those cited by the Secretary, Yuckert Pet. 21-23), reads the Act to invalidate any threshold severity step that authorizes the summary denial of benefits to any claimant with more than a de minimis or slight impairment. Each of the courts allows the Secretary to adopt a de minimis threshold severity step, "provid[ing] for the denial of benefits to claimants who have slight or minimal impairments." (Yuckert Pet. at 22). The only difference among the circuit court rulings is that some courts imposed a de minimis interpretation on the existing step two regulations, while others opted to strike down the regulations while allowing for -- even inviting -- the promulgation of a valid step two regulation. The first group includes: Salmi v. Secretary of Health and Human Services, 774 F.2d 685 (6th Cir. 1985); Farris v. Secretary of Health and Human Services, 773 F.2d 85 (6th Cir. 1985); Garza v. Heckler, 771 F.2d 871 (5th Cir. 1985); Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985); Estran v. Heckler, 745 F.2d 340 (5th Cir. 1984); Flynn v. Heckler, 768 F.2d 1273 (11th Cir. 1985); Brady v. Heckler, 724

_/ Footnote continued.

results in denials of benefits at step two only to claimants who "would be found not to be disabled at subsequent steps of the sequential evaluation process in any event," (Yuckert Pet. at 24) i.e., who would be unable to meet their statutory burden of proof at a later step. In SSR 85-28 the Secretary has thus sought to give the pre-existing severity regulations and rulings a de minimis interpretation. (Compare, Stone, 752 F.2d at 1105.

F.2d 914 (11th Cir. 1984); Evans v. Heckler 734 F.2d 1012 (4th Cir. 1984). The second group includes: this case; Brown v. Bowen, No. 85-1736 (8th Cir. March 25, 1986) (Resp. Br. App. 21a); Hansen v. Heckler, 783 F.2d 170 (10th Cir. 1986); Yuckert; and Baeder v. Heckler 768 F.2d 547 (3d Cir. 1985). See also Dixon v. Heckler, ___ F.2d ___, Unempl. Ins. Rep. (CCH) ¶ 16,640 (2d Cir. 1986).

In short, all the courts of appeals to have addressed the issue have interpreted the relevant requirements of the Act in the same way and have either specifically endorsed a de minimis standard at step two or left the Secretary free to adopt such a standard. The only distinction among the cases lies in the remedial avenue chosen to achieve compliance with the Act's requirements.

The Secretary attempts to manufacture a conflict worthy of this Court's attention. He claims that the courts that have not invalidated the severity regulations have "correctly construed [them] to provide for the denial of benefits to claimants who have 'slight' or 'minimal' impairments," (Yuckert Pet. at 22), while he implies that the courts that have invalidated the regulations would not allow even a de minimis step two test. (Id. at 21-22); (Pet. at 13). The claimed conflict rests solely on two distortions.

First, not one of the circuits upheld the existing regulations and rulings as the Secretary had interpreted and applied them. Instead, the circuits the Secretary now denominates as "correct" adopted and imposed on the Secretary the de minimis interpretation of the regulations first announced in Brady: "[A]n impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the in-

dividual s ability to work, irrespective of age, education or work experience." Brady, 724 F.2d at 920.

Second the Secretary's view that the courts that did not invalidate the regulations were "correct" is of very recent vintage. Those rulings became "correct" only on November 15, 1985, with his reevaluation and change in policy through SSR 85-28. Statement at ¶ 13, and § III.C.1. supra. Prior to that, the Secretary always opposed a de minimis step two test and consistently defended the regulations and rulings creating a more onerous standard. Compare (Pet. App. 17a-22a), with (Yuckert Pet. 20 n.13, 21-24).*/

Baeder was the first ruling that invalidated the step two regulations. The court held that, "we believe that Section [20 C.F.R. 404.]1520(c) of the regulations does more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature ... We will not rewrite the regulation to make it conform to the statutory mandate, although other courts have ... As it stands, we hold that the severity regulation ... is inconsistent with the Social Security Act, and

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*/ In Stone, the court noted the Secretary's continued refusal to follow Brady despite three previous Fifth Circuit decisions adopting it, and held that in every case where the Secretary neither cited Fifth Circuit precedent nor recited the Brady formulation, the claim had to be remanded on the assumption that the wrong interpretation had been applied. Stone, 752 F.2d at 1106. Despite the Secretary's present position that Stone and Brady are "correct," he continued to oppose the de minimis test in the Fifth and Eleventh circuits even after those cases were decided. E.g., Garza, 771 F.2d at 873; Jason v. Heckler, 767 F.2d 82, 85 (5th Cir. 1985); Davis v. Heckler, 759 F.2d 432, 435 (5th Cir. 1985); Flynn, 768 F.2d at 1275.

therefore, is invalid." Baeder, 768 F.2d at 553 (emphasis added). */

In Hansen, which also strikes down the step two regulations, the court stated that, "the severity regulation can be reconciled with the Act and the case law only if it is used as a preliminary screening device to deny claimants with impairments so minimal that they could under no circumstances have a serious impact on the ability to work." 783 F.2d at 174. The court noted that the Secretary had refused to "apply in total the de minimis standard required by the relevant court decisions," id. at 175, and that Stone revealed the Secretary's refusal to follow even repeated court of appeals pronouncements of the de minimis standard. Id. at 176. Thus, like the court below, the Hansen court was left with no viable alternative by the Secretary, but to invalidate the existing step two regulations. Id. Accord Brown v. Bowen, slip op. at 5-6 (Resp. Br. App. 25a-26a).

In sum, the Secretary's presentation of the conflict assertedly warranting resolution by this Court is flawed at each critical juncture. Not only is there no conflict among the courts of appeals as to the requirements of the Act, but the courts have been unanimous in condemning the Secretary's severity step regulations as he has interpreted and applied them to deny benefits to a claimants with more than a de minimis impairment.

3. The petition should also not be held because the step two ruling below was clearly correct.

(a) The statutory definition of disability and the legislative history of the Act have caused "all twelve circuits to have unanimously held that, while the ultimate burden of prov-

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*/ The Third Circuit, like the other courts invalidating the regulations, declined to impose upon them an interpretation the Secretary resisted. Instead it left him free to write new regulations consistent with the Act.

ing disability lies with the claimant. the plaintiff makes a prima facie showing when he demonstrates an impairment which prevents him from performing his previous work." (Pet. App. at 15a) (citing circuit court cases). */ The Secretary's pre-SSR 85-28 step two regulations and rulings did not respect this statutory allocation of the burden "because they deny benefits even to the plaintiff who has carried his prima facie burden." (Id. at 16a). The court of appeals' burden of proof ruling thus prohibited only that practice clearly prohibited by the unanimous rulings of the courts of appeals.

(b) This Court has recognized that the Act requires individualized disability determinations. Heckler v. Campbell, 461 U.S. 458, 467 (1983). The Secretary's step two regulations and rulings violated this statutory principle because they permitted the denial of benefits at step two without consideration of an individual claimant's ability to meet his prima facie burden of proof. (Pet. App at 17a). As the court of appeals noted, the Secretary summarily denied benefits to both of the named plaintiffs on the basis of just such a non-individualized determination, even though both claimants had met their prima facie and ultimate burdens of proof under the Act. (Id. 5a-6a, 17a).**/

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*/ The Secretary focuses on the legislative history to support his authority to implement a de minimis threshold test under the Act. (Yuckert Pet. at 11-21); see, § III.C.1, supra. But the decision below also reads the legislative history to permit a de minimis standard. (Pet. App. 18a-21a).

**/ In dissenting from the denial of the petition for rehearing in banc, Judge Easterbrook characterized the Secretary's step two regulations as "meek", designed "merely to filter

Footnote continued on next page.

(c) Every circuit to have addressed the severity step question -- ten in all -- has left the Secretary free to adopt a de minimis step two test and found that the policies invalidated here exceeded the strictures of such a test. See § III.C.2, supra. Not even the Secretary now defends the statutory integrity of his old (pre-SSR 85-28) step two policies. See § III.C.1, supra.

D. Holding The Petition Would Harm Those Respondents Concededly Entitled To Relief

While the Secretary does not and cannot advance any legitimate interest to be served by holding the petition, many respondents have a substantial interest in its expeditious resolution. Their interest arises from their right to relief that the Secretary does not challenge, and which cannot be affected by the rulings in City of New York, Owens, or Yuckert.

The severity step question posed here concerns only those regulations (declared invalid by the court of appeals) that increased claimants' statutory burden of proof -- 20 C.F.R. § 404.1520(c) and 416.920(c). (See, Pet. at 1 (Question 2)); Pet. App. 2a-4a). It does not concern the second part of the court of appeals step two ruling, which was that the Act at all relevant times had required the Secretary to "consider the combined effect of all of the claimants' impairments," and that the Secretary's nonconforming regulations (20 C.F.R. §§ 404.1522 and 416.922 (1984)) were invalid. (Pet. App. 22a-27a. See Pet. at 1 - 14) (no reference to combination regulations or to

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*/ Footnote continued.

out people without hope of getting benefits at later stages of the sequential evaluation process." (Pet. App. 34a). The cases of the named plaintiffs illustrate that the actual effect of the regulations was very substantial, resulting in benefit denials to thousands of claimants who not only might have shown that they meet the requirements for disability benefits at later steps, but who had made that showing.

that part of decision invalidating them)). Under this ruling, all class members are entitled to a redetermination of their eligibility for benefits under a standard which considers the combined effect of all of their impairments. (Pet. App. 27a; aff'g, Pet. App. 74a-76a, 90a-95a). A significant portion of the class -- namely those members who received a final decision of the Secretary within 60 days prior to the filing of the complaint -- are entitled to that relief regardless of what is decided in City of New York, Owens or Yuckert. This is because those class members cannot possibly run afoul of procedural rulings adverse to respondents in City of New York or Owens, and because Yuckert does not raise any question involving the Secretary's obligation to combine impairments. In this context, holding the petition here will, for a long time, deprive many respondents of relief to which they are concededly entitled now. When the Secretary presents no legitimate reason for holding the petition, such delay should not be permitted.

* * *

The Secretary incorrectly has sought to ascribe to the Seventh Circuit the view that, because it invalidated the severity regulations, it prohibited him from adopting a preliminary screening step which would deny disability benefits to claimants with minimal impairments on the basis of medical factors alone. But the court of appeals has never adopted this view. On the contrary, it held that the Secretary's adoption of such a test would conform with the Act's requirements. (Pet. App. at 17a-22a); see Bunch v. Heckler, 778 F.2d 396, 398 n.4 (7th Cir. 1985). See § III. B. supra. In this context, there is no possibility that any plenary decision in Yuckert

would effect the severity step ruling below -- a ruling which is, in any case, clearly correct, not in conflict with any other court of appeals decision, and apparently in conformity with the Secretary's current severity step policies.

CONCLUSION

Insofar as the petition presents the Section 405(g) question, it should be held and disposed of in light of the plenary rulings in City of New York and Owens. But certiorari should be denied as to the severity step question, regardless of the disposition of the Yuckert petition. */

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*/ One possible disposition of the Section 405(g) question, in light of the plenary rulings in City of New York and Owens, would be for this Court to grant certiorari, vacate the judgment below in relevant part, and remand it for reconsideration in light of those decisions. If this is done, and the court of appeals severity step ruling is left intact, respondents respectfully request that the Court's vacation order specifically denote that it is limited to that part of the court of appeals decision relating to the Section 405(g) "jurisdictional issues." (Pet. App. 8a-13a).

Respectfully submitted,

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Part IB
Rulings Based on
Program Policy Statements

(PPS-122) SSR 85-28

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To clarify the policy for determining when a person's impairment(s) may be found "not severe" and, thus, the basis for a finding of "not disabled" in the sequential evaluation of disability, and thereby reflect certain circuit court decisions that have taken issue with the Secretary's previously stated definition of "not severe" impairments.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended. Regulations No. 4, sections 404.1520-404.1523 and Regulations No. 16, sections 416.920-416.923.

PERTINENT HISTORY: The basic definition of disability is contained in sections 223(d)(1)(A) and 1614(a)(3)(A) of the Act. Under this definition, an individual must have, as an initial requirement, a "physical or mental impairment," as defined in sections 223(d)(3) and 1614(a)(3)(C), and which is expected either to result in death or to last at least 12 months. The principal requirement regarding impairment severity contained in the basic statutory definition of disability is that the individual's inability to engage in any substantial gainful activity (SGA) be "by reason of" the impairment.

In reporting on the Social Security Amendments of 1954 which first introduced the basic definition of disability into the Act, the Senate Committee on Finance indicated that the definition required that there be a "medically determinable *impairment of serious proportions*," that is, "of a nature and degree of severity sufficient to

justify its consideration as the cause of failure to obtain any substantial gainful work."

In the Social Security Amendments of 1967, Congress introduced into the Act the provision in section 223(d)(2)(A) which sets out a specific requirement respecting impairment severity and which provides for the consideration of vocational factors in determining disability. An individual "... shall be determined to be under a disability only if his *physical or mental impairment or impairments are of such severity* that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy ..." (emphasis added). In reporting on these amendments, both the Senate Committee on Finance and the House Committee on Ways and Means reaffirmed the need for some assurance that a finding of disability would be based on a *serious impairment*. The Committees explained that the provisions of the amendment would require, in part, that:

> "... an individual would be disabled *only if it is shown that he has a severe medically determinable physical or mental impairment or impairments* ..." (emphasis added).

As in 1954 and 1967, Congress, again, in the Social Security Disability Benefits Reform Act of 1984, made it clear that a denial of disability benefits may be based on medical factors alone. In amending section 223(d)(2) and section 1614(a)(3) of the Act to provide for the evaluation of the impact of multiple impairments throughout the sequential evaluation process, Congress introduced language which affirms the presence of a severity threshold in the adjudicative process:

> "In determining whether an individual's physical or mental impairment or impairments are *of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section*, the Secretary shall consider the combined effect of all of the individual's impairments ..."

The validity of a disability decision based on medical considerations alone was also recognized in the Conferees' discussion of the amendment (House of Representatives Conference Report 98-1039 to accompany H.R. 3755, September 19, 1984, p. 30) in which it was stated that there was no intention to "either eliminate or impair" the use of the "current sequential evaluation process."

The principle that a denial determination may be made on the basis of medical considerations alone was first reflected in Regulations No. 4, section 404.1502(a), published in 1960. Regulations published in 1978 revised the 1960 statement concerning such determinations by replacing the phrase "... the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities ..." with "... the medically de-

terminable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

This change in regulatory definition was introduced in the language describing step 2 of the sequential evaluation process which was formalized in regulations effective February 26, 1979. (The 1980 recodification of the Disability Regulations into common sense language reworded the definition of a not severe impairment as follows: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities." 20 C.F.R. 404.1521(a) and 416.921(a). Also see sections 404.1520(c) and 416.920(c).) These changes in regulatory language were *not* intended to alter the levels of severity for a finding of not disabled on the basis of medical considerations alone. Rather, they were intended only to clarify the circumstances under which such a finding would be justified (*Federal Register*—March 7, 1978, p. 9296–9297; November 28, 1978, p. 55357–55358). Nevertheless, some recent circuit court decisions have taken exception to the threshold of impairment severity applied in the adjudication of subject cases which were denied on the basis of not severe impairment.

As observed by the Congress, the Social Security Administration (SSA), as part of an ongoing review, is reevaluating the application of the not severe impairment policy and will continue to do so. This ruling is part of the ongoing reevaluation and interprets and clarifies the current policy on not severe impairment, describes the threshold intended, and reflects recent legislation. Also, it is being issued to clarify that SSA's policy is consistent with various court decisions. For example, *Stone* v. *Heckler*, 752 F.2d 1099 (5th Cir. 1985), and *Estran* v. *Heckler*, 745 F.2d 340 (5th Cir. 1984), stated that "an impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." As *Baeder* v. *Heckler*, No. 84-5663 (3rd Cir. July 24, 1985), suggested, the severity regulation is to do no "more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working."

POLICY CLARIFICATION: In determining, for initial entitlement to benefits, whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, ability to do past work, and ability to do other work (in light of the individual's age, education and work experience) are considered, in that order. See 20 CFR sections 404.1520 and 416.920. In determining continuing entitlement to benefits, the adjudicator, with appropriate consideration of the medical improvement review standard, also follows a sequential evaluation process which includes the "not severe impairment" concept. Fundamental to these processes is the statutory requirement that to be found dis-

abled, an individual must have a medically determinable impairment "of such severity" that it precludes his or her engaging in any substantial gainful work.

As explained in 20 CFR, sections 404.1520, 404.1521, 416.920(c), and 416.921, at the second step of sequential evaluation it must be determined whether medical evidence establishes an impairment or combination of impairments "of such severity" as to be the basis of a finding of inability to engage in any SGA. An impairment or combination of impairments is found "not severe" and a finding of "not disabled" is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental abilities(s) to perform basic work activities). Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be not severe would not prevent him or her from engaging in SGA.

The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs. Examples of these are walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling, seeing, hearing and speaking, understanding, carrying out, and remembering simple instructions, use of judgement, responding appropriately to supervision, coworkers, and usual work situations, and dealing with changes in a routine work setting. Thus, these basic work factors are inherent in making a determination that an individual does not have a severe medical impairment.

Although an impairment is not severe if it has no more than a minimal effect on an individual's physical or mental abilities(s) to do basic work activities, the possibility of several such impairments combining to produce a severe impairment must be considered. Under 20 CFR, sections 404.1523 and 416.923, when assessing the severity of what such impairments an individual may have, the adjudicator must assess the impact of the combination of those impairments on the person's ability to function, rather than assess separately the contribution of each impairment to the restriction of his or her activity as if each impairment existed alone. A claim may be denied at step two only if the evidence shows that the individual's impairment(s), when considered in combination, are not medically severe (i.e., have no more than a minimal effect on the person's physical or mental abilities(s) to perform basic work activities). If such a finding is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.

Inherent in a finding of a medically not severe impairment or combination of impairments is the conclusion that the individual's ability to engage in SGA is not seriously affected. Before this conclusion can be reached, however, an evaluation of the effects of the impairment(s) on the person's ability to do basic work activities must be made. A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities; thus, an assessment of function is inherent in the medical evaluation process itself. At the second step of sequential evaluation, then, medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities. If this assessment shows the individual to have the physical and mental ability(ies) necessary to perform such activities, no evaluation of past work (or of age, education, work experience) is needed. Rather, it is reasonable to conclude, based on the minimal impact of the impairment(s), that the individual is capable of engaging in SGA.

By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work. If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate. The inability to perform past relevant work in such instances warrants further evaluation of the individual's ability to do other work considering age, education, and work experience.[1]

Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued. In such a circumstance, if the impairment does not meet or equal the severity level of the relevant medical listing, sequential evaluation requires that the adjudicator evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience.

[1]This provision does not conflict with, nor negate, the policy stated in SSR 82-63 concerning special "no recent or relevant work experience" cases. In such cases an individual must be found to have a severe impairment, i.e., one which has more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities, in order to be considered under the special provision of that Ruling.

EFFECTIVE DATE: On publication.

CROSS-REFERENCES: Program Operations Manual System, sections DI 00401.390–DI 00401.410; DI A00401.390–DI A00401.410.

TITLES II AND XVI: THE SEQUENTIAL EVALUATION PROCESS

PURPOSE: To state the policy regarding sequential evaluation of disability as set forth in the regulations and to explain and clarify the provisions so there is a better understanding of this policy which will result in the correct and consistent application of these provisions of the regulations

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a) of the Social Security Act, as amended; Regulations No. 4, Subpart P, sections 404.1510, 404.1520, 404.1521, 404.1525, 404.1526, 404.1528, 404.1545, 404.1560-404.1572, 404.1577, 404.1578 and Appendix 1; Regulations No. 16, Subpart I, sections 416.910, 416.920, 416.921, 416.925, 416.926, 416.928, 416.945, and 416.960-416.972

INTRODUCTION: In determining whether an individual (except for a title II widow, widower, or surviving divorced spouse, or a title XVI child under age 18 or "statutorily blind" individual) is disabled, the regulations state that a sequential evaluation process is followed whereby current work activity, severity and duration of the impairment(s), ability to do past work and vocational factors are considered in that order. (To be found disabled, title II widows, widowers, or surviving divorced spouses and title XVI children under age 18 must meet or equal the Listing of Impairments in Appendix 1, Subpart P of the Regulations.) (See SSR 82-53 (PPS-74 Basic Disability Evaluation Guides).) This policy statement explains sequential evaluation by going through each step of the process. Where appropriate, cross-references are made to: (1) other PPS's which cover, in greater detail, specific steps in the process; or (2) pertinent regulatory provisions which are self-explanatory and not repeated here.

POLICY STATEMENT: If a title II or title XVI claimant is not working or his or her work does not demonstrate the ability to engage in any substantial gainful activity (SGA) during the period in which disability is alleged, we give primary consideration to the severity of the individual's impairment(s). In addition, if medical considerations alone are not determinative of the issue of disability for a title II worker or childhood disability claimant or for a title XVI claimant age 18 or older, we consider the ability to do past relevant work and the individual's age, education, training and work experience, as they relate to the ability to perform any other work.

The following evaluation steps are followed in the sequence shown, *but when a determination or decision that an individual is or is not disabled can be made at any step, evaluation under a subsequent step is not necessary.*

Is the Individual Engaging in Substantial Gainful Activity?

When an individual is actually engaging in SGA or did so during any pertinent period, and there is no possibility of establishing a period of disability which ended prior to the date of the decision, a finding shall be made without consideration of either medical or vocational factors that the individual is not under a disability. When a title II or title XVI claimant is not (or was not) actually engaging in SGA, primary consideration is given to the severity of the individual's impairment(s). (See SSR 81-7 (PPS-55 Substantial Gainful Activity Earnings Guidelines After 1977) and SSR 81-39 (PPS-60 Determination of Substantial Gainful Activity of Employees, etc.) which further explain some of the basic concepts.)

Does the Individual Have a Severe Impairment?

A finding of ability to engage in SGA may be justified on the basis of medical considerations alone when the degree of a medically determinable impairment is found to be not severe. A not severe impairment may consist of *one or more* separate conditions that do not significantly limit the individual's physical or mental capacity to perform basic work-related functions.

Performance of basic work-related functions involves a capacity for sitting, standing, walking, lifting, pushing, pulling, handling, seeing, hearing, communicating, and understanding and following simple instructions. When there is no significant limitation in the ability to perform these types of basic work-related functions, an impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past. Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered. (See SSR 82-55 (PPS-84 Medical Impairments That Are Not Severe).)

Does the Individual Have an Impairment(s)
Which Meets or Equals the Listing?

A finding of disability will ordinarily be justified when the individual's impairment is one which is as severe as the impairments contained in the Listing of Impairments. The Listing of Impairments (see Regulations No. 4, Subpart P, Appendix 1) contains over 100 medical conditions which would ordinarily prevent an individual from engaging in *any* gainful activity. The Listing helps to assure that determinations or decisions of disability have a sound medical basis, that claimants receive equal treatment throughout the country, and that the majority of persons who are disabled can be readily identified.

The level of severity described in the Listing is such that an individual who is not engaging in SGA and has an impairment or the equivalent of an impairment described therein is generally considered unable to work by reason of the medical impairment alone. Thus, when such an individual's impairment or combination of impairments meets or equals the level of severity described in the Listing, and also meets the duration requirement, disability will be found on the basis of the medical facts alone in the absence of evidence to the contrary (e.g., the actual performance of SGA, or failure to follow prescribed treatment without a justifiable reason). *The claimant's impairment(s) must meet or equal a listed impairment for a favorable determination or decision to be based on medical considerations alone.*

Evaluating Medical Equivalence—Medical Judgment Required

For an impairment to be found to be equivalent in severity to a listed impairment, the set of symptoms, signs and laboratory findings in the medical evidence supporting a claim must be compared with and found to be equivalent in terms of medical severity and duration to the set of symptoms, signs and laboratory findings specified for a listed impairment. When the individual's impairment is not listed, the set for the most closely analogous listed impairment is used.

Where an individual has a combination of impairments, none of which meets or equals a listed impairment, and each impairment is manifested by a set of symptoms and relevant signs and/or abnormal laboratory findings, the collective medical findings of the combined impairments must be matched to the specific set of symptoms, signs, and laboratory findings of the listed impairment to which they can be most closely related. The mere accumulation of a number of impairments will not establish medical equivalency. In no case are symptoms alone a sufficient basis for establishing the presence of a physical or mental impairment.

Any decision as to whether an individual's impairment or impairments are medically the equivalent of a listed impairment must be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including consideration of a medical judgment about medical equivalence furnished by one or more physicians designated by the Secretary. The Disability Determination Services physician's documented medical judgment as to equivalency meets this regulatory requirement.

Interrelationship of Medical and Vocational Factors

Title II Worker or Childhood Disability Beneficiary/Title XVI Claimant Age 18 or Older

When a determination cannot be made on the basis of the medical factors alone (i.e., when the impairment falls short of the level of severity depicted by the Listing, yet there is a significant limitation in the ability to perform basic work-related functions), the sequential evaluation

process must continue with consideration of the vocational factors in the claim. *A finding of ability to engage in any SGA cannot be justified solely on the grounds that the impairment does not meet or equal the level of severity depicted by the Listings.*

Evaluation under Regulations No. 4, section 404.1520(e) and (f) and Regulations No. 16, section 416.920(e) and (f) requires careful consideration of whether the individual can do past relevant work (PRW), and if not, whether he or she can reasonably be expected to make a vocational adjustment to other work. When the individual's residual functional capacity (RFC) precludes meeting the physical and mental demands of PRW, consideration of all the facts of the case will lead to a finding that (1) the individual has the functional and vocational capacity for other work, considering the individual's age, education, and work experience, and that jobs which the individual could perform exist in significant numbers in the national economy, or (2) the extent of work that he or she can do, functionally and vocationally, is too narrow to sustain a finding of ability to engage in SGA.

Since the severity of the impairment must be the primary basis for a finding of disability, this step of the evaluation process begins with an assessment of the claimant's functional limitations and capacities. Then a determination or decision must be made as to whether the individual retains capacity to perform past relevant work. An evaluation is then made of age, education, work experience and training. Consideration of the following principles will help identify the key issues for resolution with respect to these factors. No single factor should be considered as conclusive. They should be applied in combination to the range of work that remains within the claimant's RFC.

Whether the claimant retains the functional capacity to perform work which he or she has done in the past has far-reaching implications and should be developed and explained fully in the disability determination or decision. Neither the determination or decision nor the denial notice should concede inability to do past work unless there is adequate documentation to establish the fact. Since this is an important and, in some instances, a controlling issue, every effort should be made to secure evidence that resolves the issue clearly and explicitly.

The vocational factors as well as RFC are described in detail as follows:

- *RFC*—RFC is the remaining ability to perform work-related physical and mental activities. The claimant's functional capacity must be defined in terms of the claimant's ability to function in a work setting. When multiple impairments are involved, the assessment of RFC reflects the restrictions resulting from all impairments (both severe and not severe impairments). This assessment is based on all relevant evidence pertaining to RFC consistent with appropriate clinical and laboratory findings.

  Assessment of physical capacities (e.g., strength and exertional capabilities) includes an evaluation of the individual and indicates

his or her maximum RFC for sustained activity on a regular basis. Such assessment also includes an evaluation of the ability to perform significant physical functions such as walking, standing, lifting, carrying, pushing, or pulling, and such other physical traits and sensory characteristics as reaching, handling, seeing, hearing, and speaking insofar as limited capacity to perform these activities may affect the individual's capacity for work for which he or she would otherwise be qualified.

Any medically determinable impairment(s) not resulting in exertional limitations (such as certain mental, sensory or skin impairments) must be considered in terms of the limitations resulting from the impairment. When an individual has such impairment(s) in addition to an exertional impairment(s), remaining functional capacity must be assessed in terms of the degree of any additional narrowing of the individual's work-related capabilities. The assessment of impairments because of mental disorders includes consideration of such factors as the ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and customary work pressures in a routine work setting.

The RFC assessment is based primarily on the medical findings, i.e., the symptoms, signs, and laboratory results, which must be complete enough to permit and support the necessary judgments concerning the individual's physical, mental, and sensory capacities and any environmental restrictions. Descriptions and observations of the claimant's restrictions by medical and nonmedical sources in addition to those made during formal medical examinations must also be considered in the determination of RFC.

Where no issue with respect to specific physical or mental capacities is raised by the allegations of the individual or the evidence obtained, the individual is considered to have no restrictions with respect to those capacities. The individual has the burden of proving that he or she is disabled and of raising any issue bearing on that determination or decision.

For the purpose of determining the exertional requirements of work in the national economy, jobs are classified as "sedentary," "light," "medium," "heavy," and "very heavy." Such terms have the same meanings as are used in the *Dictionary of Occupational Titles*, published by the Department of Labor (DOL), and when used in making disability determinations or decisions are used as follows: sedentary work, light work, medium work, heavy work, and very heavy work. In order to evaluate the claimant's skills and to help determine the existence in the national economy of work the claimant is able to do, occupations are classified as unskilled, semiskilled, and skilled. For classifying these occupations, material published by the DOL are used.

- *Age*—The term "age" refers to chronological age and the extent to which it affects the individual's ability to adapt to a new work situation and engage in work in competition with others. Reference sources and materials dealing with chronological age in terms of vocational impact point to a direct relationship between age and the ability to adjust to other work.

  These sources and materials reflect employment problems developing at age 45 and the problems becoming significantly intensified at age 55. Thus, the regulations reflect age 55 and over as "advanced age," representing the point when age could be expected to be an adverse consideration in determining an individual's vocational adaptability to work differing from that of his or her past experience. However, "disability is *never* determined on the basis of age alone. The following age classifications are established in Regulations Nos. 4 and 16 (see sections 404.1563 and 416.963): younger person, person approaching advanced age, and person of advanced age. These designations of age are an expectancy only, not arbitrary limits, and may not be crucial in a particular case. Age categories are not applied mechanically in borderline cases.

- *Education and Training*—Education generally refers to formal schooling; training refers to skills and knowledge acquired on the job or through general experience in an industry or field of work. Both can significantly affect ability to work, and must therefore be considered in evaluating the impact of an impairment on an individual claimant. (Regulations Nos. 4 and 16, sections 404.1564 and 416.964, establish the following classifications of educational levels: illiteracy, marginal education, limited education, high school and above, and inability to communicate in English.)

  Training that is vocationally significant prepares an individual to do a specific job or provides background to do a number of jobs in the same field. Training that is not reflected in the individual's actual work experience would raise questions as to its adequacy and current usefulness to the individual. Content, duration, and recency should be considered in determining the scope and application of training and its current usefulness. Normally, if an individual completed training more than 15 years prior to the point at which the claim is being considered for adjudication (or when the earnings requirement was last met if earlier) and did not make use of it in his or her work, it would not affect the claimant's vocational outlook at the present time. Moreover, even if completed within the 15-year period, training would not ordinarily be expected to qualify an individual for more than entry level (e.g., at the apprenticeship or lowest beginning level) occupations. Therefore, care should be exercised to assure that undue weight is not attributed to training and to ascertain how training can be utilized in occupations.

- *Experience*—The jobs a person has done, the length of time spent at them, and the recency of the work are major factors in determining his or her ability to work. Work experience is relevant when it was performed within the pertinent 15-year period, lasted long enough for the individual to learn the job, and consisted of SGA. Work experience must be examined in the light of available knowledge of the physical and skill demands of different kinds of work in order to evaluate the effect of the impairment on the person's ability to return to past relevant work or to utilize remaining capacities in other jobs. (For a more detailed discussion of prior work experience, see SSR 82-62 (PPS-80: A Disability Claimant's Capacity to Do Past Relevant Work).)

The RFC assessment is used to determine whether an individual can perform past relevant work or considering an individual's age, education and work experience, other work which exists in the national economy.

- *Capacity to Do Past Relevant Work*—The RFC to meet the physical and mental demands of jobs a claimant has performed in the past (either the specific job a claimant performed or the same type of work as it is customarily performed throughout the economy) is generally a sufficient basis for a finding that the individual is not disabled. Past work experience should be considered carefully to assure that the available facts support conclusions regarding the claimant's ability or inability to perform this work.

  Where an individual with a marginal education and long work experience of 35 years or more limited to the performance of arduous unskilled physical labor is not working, and is no longer able to perform such labor because of a severe impairment(s), such an individual will generally be found to be disabled. (See Regulations Nos. 4 and 16, sections 404.1562 and 416.962.) Also a person generally will be found disabled if he or she has a severe impairment of any nature, is of advanced age, has a limited education, and has no relevant work experience.

  If the individual is able to meet the physical and mental demands of past relevant work, he or she should be found not disabled. However, the inability to do past relevant work is not in itself a basis for a finding of disability.

- *Capacity to Do Other Work*—If an individual cannot perform any past relevant work because of a severe impairment(s), but the remaining physical and mental capacities are consistent with meeting the physical and mental demands of a significant number of jobs (in one or more occupations) in the national economy, and the individual has the vocational capabilities (considering age, education, and past work experience) to make an adjustment to work different from that performed in the past, it shall be determined that the individual is not disabled.

> However, if an individual's physical and mental capacities in conjunction with his or her vocational capabilities (considering age, education and past work experience) do not permit the individual to adjust to work different from that performed in the past, it shall be determined that the individual is disabled.

The assessment ability to engage in SGA involves the evaluation of such factors as the functional capacity to perform the physical or mental exertion of work and to sustain work at a level which meets the standards of SGA on a regular and continuing basis. In all such cases where a determination or decision regarding disability is to be made, the evidence must be sufficient to permit a comparison between the claimant's capabilities and limitations and the requirements of relevant occupations.

The regulations require that, at this point in the sequential evaluation process, the rules established in Appendix 2 to Subpart P of Regulations No. 4 must be used to direct or to guide the determination as to whether the individual is "disabled." Where all factors relative to an individual coincide with those in a rule in the Appendix, that rule directs a conclusion as to whether the individual is "disabled." When all factors do not coincide with a rule (e.g., the individual has the RFC for more than light work but for less than the full range of medium work), the rules are used as a frame of reference for determining whether the individual is "disabled."

Similarly, when an individual has a combination of exertional and nonexertional impairments, the rules are used as a frame of reference for determining "disability." The exertional impairment is considered first under the applicable rule, and then the additional restriction(s) imposed by the nonexertional impairment is considered.

When an individual has a solely nonexertional impairment, the principles established in the regulations are applied in determining "disability," giving consideration to the rules for specific case situations described in Appendix 2 (i.e., use of the rules as a frame of reference). When the nonexertional impairment is a mental impairment, the ability to concentrate, to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and pressures in a work setting are considered. (See Regulations Nos. 4 and 16, sections 404.1545(c) and 416.945(c).)

The Disability Determination or Decision

The disability determination or hearing decision must be set forth carefully. The rationale must reflect the sequential evaluation process, describe the weight attributed to the pertinent medical, nonmedical and vocational factors in the case, and reconcile any significant inconsistencies. Reasonable inferences may be drawn, but presumptions, speculations and suppositions should not be substituted for evidence.

If the determination or decision is based on medical-vocational considerations, it must always contain findings that the individual is not engaging in SGA, there is a severe impairment, but that the individual's impairment(s) does not meet or equal that of any impairment described in the Listing of Impairments; must describe the individual's specific RFC; and must sequentially relate it to physical and mental demands of past work or other substantial work to which the individual could or could not be expected to make a vocational adjustment by reason of her or his age, education and past work experience. Each finding of fact must be based on supporting evidence.

In the rationale for a denial, a mere conclusion that "the impairment(s) is not severe enough to prevent the claimant from engaging in SGA" is insufficient. If the evidence establishes that the impairment(s) is "not severe," the rationale *must* show that the impairment(s) would not significantly affect the performance of basic work-related functions. If a denial may not be made on this basis, the rationale must reflect the remainder of the sequential evaluation process.

Similarly, an allowance based on a mere conclusion that the claimant is "not able to engage in SGA" is insufficient. The rationale must state fully the reasons for the inability to engage in SGA based on the evidence of record, the applicable regulations, and the determinative step in the sequential evaluation process. Under the regulations, a finding that an individual's impairment(s) does not meet or equal the Listing effectively indicates that he or she has a sufficient work capability at the sedentary or a higher exertional level, to require medical-vocational evaluation. Therefore, an allowance determination or decision based on a conclusion that "the claimant has no RFC" is never appropriate. If the impairment(s) does not meet or equal the Listing, the rationale *must* reflect the remainder of the sequential evaluation process. If the claimant does not, in fact, have the RFC for a full range of sedentary work, the case must be evaluated within the framework of the vocational rules. The functional restrictions which limit the claimant to less than the full range of sedentary work must be specified. It must then be determined whether, considering all of the functional limitations, a "significant number" of sedentary jobs which the claimant can perform exists in the national economy.

Where denial is on the basis of duration, if based on medical-vocational considerations, the projected RFC must similarly be described and related.

EFFECTIVE DATE The policy explained herein was effective on August 20, 1980, the date the regulations covering the basic policy in the subject area were effective (45 FR 55566).

CROSS-REFERENCES Program Operations Manual System, sections DI 2102-2102B, 2103, 2105, 2380, and 2383.

TITLES II AND XVI: MEDICAL IMPAIRMENTS THAT ARE NOT SEVERE

PURPOSE: To enunciate the policy regarding nonsevere impairments and to provide examples of impairments that are not severe in order to more clearly illustrate the level of severity required before the concept of "nonsevere impairment" can be applied in the sequential evaluation of disability.

CITATIONS (AUTHORITY): Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act, as amended; Regulations No. 4, sections 404.1520 and 404.1521; and Regulations No. 16, sections 416.920 and 416.921.

PERTINENT HISTORY: Regulations No. 4, section 404.1502(a), published in 1960, introduced the principle that a denial determination may be made on the basis of medical considerations alone. It stated that

> "... medical considerations alone may justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or combination of slight abnormalities."

Sections 404.1504 and 416.904 of the regulations published in 1978 revised the 1960 statement and included a statement on work-related functions as follows:

> "... medical considerations alone can justify a finding that an individual is not under a disability where the medically determinable impairment is not severe. A medically determinable impairment is not severe if it does not significantly limit an individual's physical or mental capacity to perform basic work-related functions."

The meaning of work-related functions was explained in 1980 by sections 404.1521 and 416.921 of the regulations which now provide:

(a) "Nonsevere impairment. An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities."

(b) "Basic work activities. When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. ..."

Examples of basic work functions are included in sections 404.1521(b) and 416.921(b).

Throughout this period of regulatory revision, we have tried to identify medical conditions which demonstrate nonsevere impairments. Based on increasing experience and extensive consultation with disability program physicians, 20 examples of medical conditions that are not severe

have now been recognized. These 20 examples are intended to illustrate a level of impairment severity where the evaluation principle for nonsevere impairments applies. In addition, these 20 examples, while not exhaustive, represent a significant number of specific impairments that serve as guidelines of the level of impairment severity which would warrant a finding that an individual's impairment is not severe.

POLICY STATEMENT: In determining whether an individual is disabled, we follow a sequential evaluation process whereby current work activity, severity and duration of impairment, residual functional capacity (RFC), and vocational factors (age, education and work experience) are considered in that order.

Built into this process is the statutory requirement that to be found disabled, an individual must have a severe medically determinable impairment. For an impairment to be considered severe, it must significantly limit the individual's physical or mental capacity to perform one or more basic work-related functions such as standing, walking, lifting, handling, seeing, hearing, speaking, and understanding and following simple instructions. An impairment that does not significantly limit the capacity to perform work-related functions, as they are required in most jobs, is not severe.

At that stage in the sequential evaluation process, when we may decide that an impairment is not severe, we do not consider the effects of age, education, and work experience (i.e., the vocational factors) since in such cases the determination is based on medical considerations alone. Similarly, the individual's RFC is not assessed in cases in which the individual's impairment is determined to be not severe. In such cases, the RFC assessment is not relevant because it is based upon functional limitations which result from a severe impairment, and, thus, it only comes into play at a later stage in the sequential evaluation process.

If an individual had a highly selective job involving unusual work-related functions, a nonsevere impairment may prevent him or her from performing his or her previous work. However, when an individual has a "nonsevere" impairment, no serious question of inability to engage in substantial gainful activity is present because the individual would clearly be able to perform the basic work-related functions as they are required in most jobs. The inability to perform prior work in such an instance would arise from *both* the specific demands of the work and the impairment rather than the impairment itself.

If the individual's impairment is shown by the medical evidence to be not severe in accordance with the criteria and examples described herein, that impairment cannot itself prevent performance of work-related functions, except as they may be required in a highly selective group of jobs. To be found disabled, an individual must have a severe medically determinable impairment. That standard cannot be satisfied by any impairment(s) that is compatible with the ability to perform basic work-related functions as required in most of the numerous jobs in the national economy.

Inasmuch as a nonsevere impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to do most jobs. However, when a nonsevere impairment(s) is imposed upon a severe impairment(s), the combined effect of all impairments must be considered in assessing RFC.

The following examples are merely representative of the types of impairments which would be considered not severe and are not intended to be all inclusive. In formulating these examples, the potential for severe and prolonged pain has been considered. These conditions are not expected to produce symptoms of severe and prolonged pain.

1. Musculoskeletal

   a. Osteoarthritis corroborated by X-ray findings, with symptoms of pain and stiffness of lumbar or cervical spine or major joints, and minimal abnormal findings on physical examination.

   b. Traumatic fracture of a vertebral body, in the absence of metabolic bone disease, with loss of less than 50 percent of height of the vertebra without significant physical findings or neurologic abnormalities.

   c. Excision of lumbar disc has been performed and there are no ongoing significant motor abnormalities or significant objective abnormal physical findings.

2. Special Senses

   a. Retention of best corrected visual acuity of 20/40 in the better eye (phakic) without significant restriction of visual fields.

   b. Retention of visual field in better eye of a radius of 45 degrees or better (visual field efficiency of approximately 70 percent).

3. Respiratory

   a. Obstructive airway disease where FEV_1 or MVV is greater than values shown in the table below, and there is no clinical evidence of impairment of gas exchange.

Height* (Inches)	FEV_1 (L/Min., BTPS)	MVV (MBC) (L/Min., BTPS)
60 or less	1.4	56
61-63	1.5	60
64-65	1.6	64
66-67	1.7	68

Height* (Inches)	FEV, (L/Min., BTPS)	MVV (MBC) (L/Min., BTPS)
68-69	1.8	72
70-71	1.9	76
72 or more	2.0	80

*Height without shoes

b. Diffuse pulmonary fibrosis where the arterial blood gas values do not meet the requirements of Listing 3.04, table III, at an exercise level of 25 ml. O_2/kg./min., or work equivalent.

4. Cardiovascular

a. Hypertension without significant organ damage, current or past.

b. History of chest pain without specific ischemic findings on ECG (rest and exercise), less than 50 percent narrowing on angiography, and without significant cardiomegaly.

c. Surgery has been performed for peripheral arterial disease and there are palpable pulses below the femoral level and no intermittent claudication.

5. Digestive

a. Colostomy, uncomplicated, with proper function of the stoma and nutrition adequately maintained.

b. Peptic ulcer, uncomplicated or with recovery from complications.

c. Chronic liver disease, in the absence of ascites, with total bilirubin less than 1.5 mg. per deciliter and serum albumin is 3.5 gm. per deciliter or greater.

d. Inflammatory bowel disease (regional enteritis, ulcerative colitis) in clinical remission for 12 months prior to adjudication.

6. Genito-Urinary

a. Nephrotic syndrome, in remission, with persistent mild edema in which urinary protein excretion is less than 500 mg. per 24 hours and serum albumin of 3.5 gm. per deciliter or greater.

b. Chronic renal disease (other than nephrotic syndrome) in which the serum creatinine is persistently less than 3 mg. per deciliter (100 ml.), in the absence of clinical complications.

7. Endocrine

   a. Diabetes mellitus, adult onset, controlled on prescribed therapy, without significant end-organ damage or recent episodes of acidosis

8. Neurological

   a. Epilepsy with no major motor seizures for 12 months prior to adjudication

   b. Peripheral neuropathy or neuritis, due to any cause, with no significant motor or sensory loss

9. Mental Disorders

   a. IQ of 80 or greater in all major areas of intellectual functioning

EFFECTIVE DATE: The policy explained herein was effective on August 20, 1980, the date the regulations covering the basic policy in the subject area were effective (45 FR 55566)

CROSS-REFERENCE: Program Operations Manual System, section 2107

(PPS-89) **SSR 82-52**

TITLES II AND XVI: DURATION OF THE IMPAIRMENT

PURPOSE: To state and explain the policy regarding the duration requirement under the disability provisions of titles II and XVI of the Social Security Act and implementing regulations

CITATIONS (AUTHORITY): Sections 223(d), 216(i), and 1614(a) of the Social Security Act, as amended; Regulations No. 4, Subpart P, sections 404.1505, 404.1509, 404.1522, 404.1598; and Regulations No. 16, Subpart I, sections 416.905, 416.909, 416.922, and 416.998

INTRODUCTION: To be found disabled, and individual must be unable to engage in any substantial gainful activity (SGA) by reason of a medically determinable physical or mental impairment(s) which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of at least 12 months. In considering "duration," it is the inability to engage in SGA because of the impairment that must last the required 12-month period. (See Social Security Ruling (SSR) 73-7c.) This policy statement explains in detail the documentation and evaluation requirements for determining if the duration requirement is met.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 85-1736

Rosa Lee Brown, Appellant, vs. Margaret M. Heckler, Secretary of Health and Human Services of the United States, Appellee.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Iowa.

Submitted: February 12, 1986

Filed: March 25, 1986

Before HEANEY and BOWMAN, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

Rosa Lee Brown appeals from a district court decision affirming the Secretary of Health and Human Services's denial of disability insurance benefits and supplemental security income benefits. For the reasons set forth below, we reverse and remand.

BACKGROUND

Brown is a sixty-two-year-old woman with two years of college training. Her past relevant work was primarily clerical

*The Honorable William C. Hanson, United States Senior District Judge for the United States District Court for the Southern District of Iowa, sitting by designation.

in nature. On May 21, 1982, she applied for disability insurance benefits and supplemental security income benefits under 42 U.S.C. §§ 416(i) and 1381(a), respectively, complaining of heart and back problems, blackout spells, neck pains, muscle spasms, general body pain, and dizziness. She attributes many of her physical problems to automobile accidents in 1978, 1979, and 1980. Brown's daily activities consist primarily of watching television while sitting or lying down. She does not cook, do housework, shop, or engage in social activities. Her pain is aggravated by sitting for more than five minutes, and her abilities to stand and walk are severely limited. She takes Motrin, Valium, and Dalmane daily.[1] The Social Security Administration denied her application both initially and on reconsideration. On May 18, 1984, a hearing was held before an administrative law judge (ALJ), who affirmed the denial. He found that although there was evidence of "early degenerative arthritis in the cervical spine and lumbar spine, early chronic obstructive pulmonary disease, and possible psychophysiological musculoskeletal reaction," Brown had not met the severity requirement of the second step of the sequential evaluation process,[2] and was therefore not disabled. The ALJ's

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[1]Motrin is an anti-inflammatory agent which is used to treat rheumatoid arthritis and osteoarthritis because it reduces joint swelling and pain. Physician's Desk Reference 1959 (36th ed. 1982). Valium is used to manage anxiety disorders as well as to relieve skeletal muscle spasms caused by injury. Id. at 1625. Dalmane is a hypnotic agent used in treating insomnia. Id. at 1587-88.

[2]20 C.F.R. §§ 404.1520 and 416.920, virtually identical provisions, outline the five-step sequential evaluation process used by the Secretary in determining disability for purposes of disability income benefits and supplemental security income benefits. They provide:

> (b) If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

determination became the Secretary's final decision when the Appeals Council denied review. On April 5, 1985, the district court affirmed the Secretary's decision.

On appeal, Brown argues that step two of the sequential evaluation process, as applied by the Secretary, contravenes the Social Security Act (Act). She also states that a remand would be necessary even if step two were valid, since the Secretary's determination of no disability was not supported by substantial

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(c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

(d) When your impairment(s) meets or equals a listed impairment in Appendix I. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe inmpairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s) we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

evidence. For the reasons discussed below, we reverse and remand.

DISCUSSION

Brown questions the validity of the second step of the sequential evaluation process. This regulation requires a finding of "not disabled" if the claimant does not have severe impairments, regardless of the claimant's age, education, or work experience. Brown argues that this regulation contravenes the Social Security Act, which requires a consideration of these vocational factors when determining disability. The Secretary argues that the regulation is consistent with the Act.

The Circuits are divided on this question. Three Circuits[3] have accepted Brown's argument and have invalidated the provision. See Hansen v. Heckler, No. 84-2366 (10th Cir. Feb. 5, 1986); Baeder v. Heckler, 768 F.2d 547, 553 (3d Cir. 1985); Yuckert v. Heckler, 774 F.2d 1365, 1370 (9th Cir. 1985). These Circuits have reasoned that the provision on its face conflicts with the Act. They point out that while the provision explicitly requires the Secretary to disregard the claimant's age, education, and work experience, the Act expressly requires those factors to be taken into account when determining disability.[4]

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[3]The Seventh Circuit has held that the second step is invalid, at least insofar as the Secretary applies it to deny benefits to claimants who are unable to perform their previous work. See Bunch v. Heckler, 778 F.2d 396, 398-99 n.4 (7th Cir. 1985); Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985).

[4]42 U.S.C. § 423(d)(2)(A) provides that

> an individual * * * shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in

See Hansen, No. 84-2366, slip op. at 8; Baeder, 768 F.2d at 551; Yuckert, 774 F.2d at 1368. The five other Circuits that have considered the question have refused to invalidate the second step, but have interpreted it as a de minimis, threshold requirement. See e.g., Stone v. Heckler, 752 F.2d 1099, 1101 (5th Cir. 1985); Salmi v. Secretary of Health and Human Services, 774 F.2d 685, 691 (6th Cir. 1985); Evans v. Heckler, 734 F.2d 1012, 1014 (4th Cir. 1984); Brady v. Heckler, 724 F.2d 914, 920 (11th Cir. 1984); Chico v. Schweiker, 710 F.2d 947, 954-55 n.10 (2d Cir. 1983). Under the de minimis approach, "[a]n impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." Brady, 724 F.2d at 920 (quoting Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations (1980)).

Regardless of whether we invalidate the second step or accept it as a de minimis requirement, a remand would be necessary; the record clearly shows that Brown's impairments, at the very least, would meet a de minimis requirement. Even though we could avoid this question, its importance and recurring nature convince us that its prompt settlement is appropriate.

We believe that those Circuits which have invalidated the provision have the stronger argument. Although the second step might be consistent with the Act if the Secretary applied it "as a preliminary screening device to deny a claimant with impairments so minimal that they could under no circumstances have a serious impact on the ability to work," Hansen, No. 84-2366, slip op. at 9, the Secretary has not done so. See Baeder, 768 F.2d at 552 ("a full forty percent of disability applicants

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the national economy * * * .

are denied benefits without any evaluation of their age, education or past relevant work experience"); Hansen, No. 84-2366, slip op. at 10-12. The facts in this case illustrate the manner in which the Secretary actually applies the severity standard. The Secretary found that Brown did not have a severe impairment for the purposes of the second step, despite her finding that Brown suffers from early degenerative arthritis, early chronic obstructive pulmonary disease, and psychophysiological impairments. Therefore, the only practical way to ensure that the Secretary follows the requirements of the Act is to invalidate the second step.[5]

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[5]The Tenth Circuit's arguments on this point were particularly persuasive:

> We must therefore consider how best to remedy the Secretary's apparent continuing intent to apply the step two severity regulation in a manner that conflicts with the Act and the controlling case law. We decline to follow those courts which have construed the regulation to embody a de minimis standard and have reversed and remanded disability determinations which do not clearly accept and apply this construction. Unfortunately, the Secretary has a history of disregarding those controlling court rulings with which she disagrees. [The Secretary displays an] intent to pay mere lip service to the de minimis standard, thus forcing a claimant to pursue a judicial appeal to obtain a disability determination properly made under the applicable law. We believe this imposes an unnecessary hardship on claimants, wastes judicial resources, and works a serious injustice on those whose legitimate claims to disability benefits are improperly denied administratively and who do not appeal.

Hansen, No. 84-2366, slip op. at 12-13 (citations omitted).

We additionally note that interpreting the second step as a de minimis requirement arguably renders it worthless, as it would be hard to conceive of an impairment which is so slight that it would not affect a claimant's ability to work under any circumstances.

In view of the fact that this case must be remanded for a consideration of Brown's ability to work in light of her vocational characteristics as well as her impairments, we make the following additional observations. The Secretary has a duty to develop a full and fair record, regardless of whether or not the claimant is represented by counsel. See e.g., Brissette v. Heckler, 730 F.2d 548, 549 (8th Cir. 1984). In this case, a complete record would fully discuss Brown's work history, the relationship between her automobile accidents and her impairments, and her physical disabilities, particularly her blackouts. The Secretary should also develop the record in regard to the medical opinion of Dr. Bery Engebretsen, Brown's treating physician, as required by Brissette, 730 F.2d at 550, and Lewis v. Schweiker, 720 F.2d 487, 489 (8th Cir. 1983). The need for this is apparent: although Engebretsen reported that Brown had "severe degenerative arthritis" and "chronic obstructive pulmonary disease," the Secretary found that Brown had no severe impairments. On remand, the Secretary should also give careful consideration to Brown's subjective complaints. See e.g., Polaski v. Heckler, 751 F.2d 943, 948 (8th Cir. 1984); Layton v. Heckler, 726 F.2d 440, 442 (8th Cir. 1984); Ragsdale v. Secretary, Department of Health, Education and Welfare, 623 F.2d 528, 530 (8th Cir. 1980). Before the Secretary may disregard Brown's subjective evidence, she must make express credibility findings. See Basinger v. Heckler, 725 F.2d 1166, 1170 (8th Cir. 1984). Finally, the Secretary should consider the disabling effect of any psychophysiological impairments that Brown may have.[6] See Klug v. Weinberger, 514 F.2d 423 (8th Cir. 1975).

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[6]Psychophysiological impairments may themselves render a claimant disabled under the Social Security Act, which defines "disability" in terms of mental, as well as physical, impairments. See e.g., 42 U.S.C. § 423(d)(1); 20 C.F.R. § 404.1520. Such an impairment, if sufficiently severe, may entitle a claimant to a finding of disabled without consideration of vocational factors. See 20 C.F.R. Part 404, Subpart P, App. 1, § 12.04.

In summary, we hold that the second step of the sequential evaluation process is invalid and remand to the Secretary to reconsider her disability determination in accord with this opinion and in light of Brown's age, education, work experience, and physical and mental impairments.

BOWMAN, Circuit Judge, concurring in part and dissenting in part.

I agree that the Secretary has not developed a full and fair record in this case, and therefore, for the particular reasons set forth by the Court, ante at 7, I join in the decision remanding the case to the Secretary for reconsideration. I see no reason, however, to hold the second step of the sequential evaluation process invalid. All the second step really says is that if the claimant's impairments do not significantly limit his or her ability to do basic work activities, then the claimant is not disabled. I do not read this as being merely a de minimis requirement, nor do I believe it is in conflict with the Social Security Act. Rather, I see it as being entirely consistent with the purpose of the Act, which is to compensate persons who cannot work, while denying the benefits of the Act to claimants who can. The statutory factors of age, education, and past work experience are appropriately taken into account, it seems to me, in the fifth step of the sequential evaluation process, which comes into play once the Secretary has determined that because of physical or mental problems the claimant cannot do any of the work he or she has done in the past. Indeed, if we invalidate the second step, then logically we also should invalidate the third step, see ante at 2-3 n.2 (subsection (c)), which like the second excludes consideration of the statutory factors of age, education, and work experience.

The problem in this case, as I see it, is not the sequential analysis, but the Secretary's failure to develop an adequate record and to consider all the evidence that should be considered

if a proper step two determination of wheth-· the claimant has a severe impairment is to be made. Accordingly, I concur in the decision to remand this case, but I respectfully dissent from the Court's holding that the second step of the sequential evaluation process is invalid under the Social Security Act.

A true copy.

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NO. 85-1442

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SUPREME COURT OF THE UNITED STATES
October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

-vs-

EDNA JOHNSON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

The Secretary's pending petition for certiorari (filed February, 1986) requested that the petition "be held and disposed of as appropriate in light of the Court's decisions on the jurisdictional issues in Bowen v. City of New York, No. 84-1923, and Bowen v. Owens, No. 84-1905, and in light of the Court's disposition of the petition for a writ of certiorari raising the question of the validity of the severity regulations in Bowen v. Yuckert, pet. for cert. pending No. 85-1409." (Pet. at 14).

This Court subsequently decided Owens without reaching the jurisdictional issues. 476 U.S. ___, 106 S. Ct. 1881 (1986). It did, however, reach these issues in City of New York, 476 U.S. ___, 106 S. Ct. 2022 (1986).

In Yuckert, the Court granted the petition for certiorari, ___ U.S. ___, 106 S. Ct. 1967 (1986), and has heard oral argument. Disposition of the petition here respecting the question of the validity of the severity regulation thus awaits the ruling in Yuckert.

On April 7, 1987, respondent in Yuckert sought leave to file a supplemental brief calling attention to a recently

discovered Social Security Administration ("SSA") memorandum. That memorandum (the "Step Two Memorandum") interpreted SSR 85-28 in a manner contradicting the Solicitor General's representations to this Court on oral argument in Yuckert. See Yuckert Supp. Br. at 3-4. The Secretary subsequently sought leave to file a responsive supplemental brief. This Court has now granted leave to file both supplemental briefs in Yuckert.

Sup. Ct. R. 22.6 provides that "[a]ny party may file a supplemental brief at any time while a petition for certiorari is pending calling attention to ... intervening matter not available at the time of the party's last filing ...." The Step Two Memorandum and the Secretary's supplemental brief in Yuckert (which both refer specifically to this case), together with Ms. Yuckert's supplemental brief, are all highly relevant "intervening matter[s]" within the meaning of this rule, given the great likelihood that this case will be disposed of "in light of" the ruling in Yuckert. (Pet. at 14). Accordingly, respondents may file this supplemental brief, restricted to these matters.

A. The Solicitor General, in his supplemental brief in Yuckert, disavows the Step Two Memorandum, asserting that it does not represent the "offical position" of the Secretary respecting SSR 85-28 (Secretary's Supp. Br. at 2). The official position, he says, is the one he advanced at oral argument and now renews in his supplemental brief. (Id. at 2, 6).

The post hoc views of appellate counsel respecting what SSA meant to accomplish through SSR 85-28 are surely entitled to less deference than the contemporanous understanding of an agency official (Associate Commissioner, Office of Hearings and Appeals) specifically charged with making adjudications under that ruling. See Motor Vehicle

Manufacturing Assn. v. State Farm Mutual, 463 U.S. 29, 50 (1983); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962). At best for the Secretary, however, the two competing understandings of SSR 85-28 (one by an agency official, the other by the Solicitor General) suggest that the SSA itself has not finally decided how SSR 85-28 should be applied, or, at least, that there are conflicting understandings within SSA itself as to the appropriate application of the ruling. In this context, deciding Yuckert, and this case, based upon any particular understanding of SSR 85-28 would have this Court abrogate a decision that is properly the agency's to make. As Ms. Yuckert suggests (Yuckert Supp. Br. at 2-4), this Court thus should not interpret or reach the validity of SSR 85-28, if it resolves the merits of the severity step question in its Yuckert ruling. And, if it remands Ms. Yuckert's case for further action in light of SSR 85-28, that would afford the Secretary an opportunity to clarify any confusion respecting the appropriate application of SSR 85-28, which has never governed the adjudication of Ms. Yuckert's claim in any forum.

B. If the Solicitor General's understanding of SSR 85-28, as explained in the Secretary's supplemental brief, does accurately reflect SSA's understanding and application of that ruling, then the Secretary has confirmed that SSA's policy is at odds with what every court of appeals says the Social Security Act requires. Every court of appeals has held that a claimant meets his prima facie burden of proof by showing that he has an impairment that prevents him from performing his past work. See Respondents' Op. Cert. Br. at 21. Under the Solicitor's understanding of SSR 85-28, however, SSA policy is unequivocally that such a showing will not suffice to meet that burden, except in the few

cases in which the claimant's past work is in some way "unique." See Secretary's Supp. Br. at 10-11. The same understanding, in turn, amounts to a formal disavowal by the Secretary of McDonald v. Heckler, 795 F.2d 1118 (1st Cir. 1986) (on which he previously relied, see Yuckert Br. for Petitioner at 17, 27, 29), where the court imposed a narrowing interpretation of SSR 85-28, to bring it into line with the requirements of the Act. */

C. Insofar as the petition here sought review of jurisdictional issues, the Secretary, as noted, initially sought to have it held and disposed of in light of the ruling in City of New York. Having lost that case, unanimously, and anticipating the possibility of a remand here for reconsideration of the severity step question in light of SSR 85-28, the Secretary now urges that:

> [S]hould the Court ... decide to dispose of respondent's case [by remanding it to the Secretary for reconsideration in light of SSR 85-28], we urge the Court to make clear that such a disposition was deemed appropriate here only because this case involved an individual claimant who pursued her administrative and judicial remedies in a timely fashion. A similar order would not be appropriate in a class action with respect to class members who failed to seek review in a

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*/ The Secretary's petitions for certiorari here and in Yuckert invoked an asserted split among the circuits as to the severity step question, and he pressed that asserted conflict in his briefs in Yuckert. But respondents here and Ms. Yuckert both have consistently urged that there was no circuit conflict worthy of this Court's attention, and that for this reason certiorari should be denied, or the writ dismissed as improvidently granted. (Respondents' Op. Cert. Br. at 17-20; Yuckert Br. for Respondent at 17-18, 44-5.) The Secretary, of course, has never accepted the propriety of either of these dispositions. But if the policy he sets forth in his supplemental brief in Yuckert is at variance with the one approved by all the appellate courts, that emphasizes the absence of any relevant split among the circuits. Moreover, the Step Two Memorandum, if credited, establishes as well that there was and is no material conflict between SSA's step two policy and the various circuit court decisions -- and thus no relevant issue, at the time certiorari was granted in Yuckert or since, deserving of this Court's attention.

> timely fashion and who thereby allowed a preliminary administrative decision denying their claims under the severity regulation to become final and binding.

Secretary's Supp. Br. at 11-12 (citing, in the same paragraph, this case as an example of the type of class action specified). The Secretary thereby seeks in Yuckert a declaration as to class jurisdictional issues not presented there, which he hopes to employ on remand against the class claimants here and in other cases.

This Court should reject that ploy. If the decisions in the class cases the Secretary identifies are to be reconsidered in the lower federal courts, insofar as the jurisdictional issues are concerned, then they should be reconsidered in light of City of New York. The Secretary himself originally suggested that this was appropriate. (Pet. at 14). It is, given that these issues were fully briefed and argued in that case. Any remand order in Yuckert should not be muddied by a jurisdictional declaration, when no jurisdictional issues have ever been argued -- or indeed could be raised -- in that case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Lehrer, a member of the Bar of this Court, hereby certify that on this 22nd day of April 1987, three (3) copies of Respondents' Supplemental Brief in Opposition to Petition for a Writ of Certiorari, were served upon the Hon. Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, Attn: Edwin S. Kneedler, Asst. to the Solicitor General, who is the attorney for the petitioner. Service was made by mailing these copies, by overnight mail (Federal Express) to Mr. Fried at the address indicated. I further certify that all parties required to be served have been served.

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